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## Ninth Circuit Survey—Criminal Law in the Ninth Circuit: Recent Developments, Parts I, II, & III

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# CRIMINAL LAW IN THE NINTH CIRCUIT: RECENT DEVELOPMENTS

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## I. ARREST, SEARCH AND SEIZURE

### A. *Expectation of Privacy*

Fourth amendment protection attaches to a warrantless search or seizure only if a person's legitimate expectation of privacy has been violated.<sup>1</sup> A legitimate expectation of privacy arises when one possesses a subjective expectation of privacy that society recognizes as reasonable.<sup>2</sup>

1. *Rakas v. Illinois*, 439 U.S. 128, 143 (1978). "[C]apacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Id.* at 143 (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)).

2. *Katz v. United States*, 389 U.S. 347 (1967). In his concurring opinion in *Katz*, Justice Harlan stated the now-famous two-prong test for determining whether a person is enti-

### 1. Briefcases

In *United States v. Allen*,<sup>3</sup> the Ninth Circuit invalidated a Drug Enforcement Agency (DEA) agents' warrantless search and seizure of Allen's briefcase and ordered the drugs found inside suppressed.<sup>4</sup> The agents contended that they had probable cause to seize the briefcase based on the following facts: Allen fit some of the characteristics of the DEA's drug courier profile, he started to tremble and perspire when informed that the agents believed he was carrying drugs, and a strip search to which Allen had consented produced no contraband.<sup>5</sup> The Ninth Circuit, however, found these facts insufficient to "warrant a prudent [person] in believing that . . . [Allen] had committed or was committing an offense."<sup>6</sup>

### 2. Paper bags

In *United States v. Honigman*,<sup>7</sup> the Ninth Circuit held that evidence found during a warrantless search was properly admitted because the container involved was a paper bag.<sup>8</sup> DEA agents discovered LSD during a warrantless search of a paper bag that Honigman was carrying through a Safeway store parking lot.<sup>9</sup> On appeal, the court first noted that the agents had probable cause to seize the paper bag.<sup>10</sup> In considering that its earlier decision in *United States v. Mackey*<sup>11</sup> was controlling, the court concluded that Honigman did not "possess a sufficient privacy interest in the paper bag to justify imposing the warrant requirement,"<sup>12</sup> and that because the bag had been lawfully seized, it could also be searched.<sup>13</sup> The distinguishing features of paper bags that the *Honigman* court considered to justify a reduced privacy interest were the ease with which they could be torn, their inability to be latched, and the relatively greater extent to which their contents

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tled to fourth amendment protection. The test requires "that a person have exhibited an actual (subjective) expectation of privacy and, . . . that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring).

3. 644 F.2d 749 (9th Cir. 1980).

4. *Id.* at 751-52.

5. *Id.* at 751.

6. *Id.* at 752 (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)).

7. 633 F.2d 1336 (9th Cir. 1980).

8. *Id.* at 1338.

9. *Id.* at 1337-38.

10. *Id.* at 1337.

11. 626 F.2d 684 (9th Cir. 1980).

12. 633 F.2d at 1338 (quoting *United States v. Mackey*, 626 F.2d 684, 687 (9th Cir. 1980)).

13. 633 F.2d at 1338.



could be discerned by holding or feeling them.<sup>14</sup>

### 3. Parent-child confidences

In *United States v. Penn*,<sup>15</sup> the Ninth Circuit ruled that there is no expectation of privacy in a mother's confidences with her minor child. The police had searched defendant Penn's home and backyard under a valid search warrant for a cache of heroin.<sup>16</sup> Penn's children, ranging in age from five to twenty-two, were present during the search.<sup>17</sup> The children were very uncooperative, and in their taunting of the police they demonstrated awareness of their mother's drug activities.<sup>18</sup> At one point during the search, an officer asked the youngest child if he knew where the heroin was hidden.<sup>19</sup> The child answered yes but hesitated when the officer asked him to point out its location.<sup>20</sup> The officer then offered the child five dollars to lead him to the heroin, and the child agreed.<sup>21</sup>

The Ninth Circuit found that the police conduct did not violate Penn's fourth amendment rights because the child "was free to reveal the information at will to anyone in the world."<sup>22</sup> Penn did not, therefore, possess a legitimate expectation of privacy in any information she had revealed to the child.<sup>23</sup>

### 4. Abandoned property

The search of abandoned property and the subsequent discovery of incriminating evidence is another circumstance in which a warrantless search or seizure is considered reasonable under the fourth amendment.<sup>24</sup> In *United States v. Diggs*,<sup>25</sup> the Ninth Circuit stated that the test of "abandonment" is whether the owner "has retained a reasonable expectation of privacy in the articles alleged to have been aban-

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14. *Id.* (citing *United States v. Mackey*, 626 F.2d 684, 687 (9th Cir. 1980)).

15. 647 F.2d 876 (9th Cir. 1980) (5-4 decision) (en banc).

16. *Id.* at 878-79.

17. *Id.*

18. *Id.* at 879.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at 883.

23. *Id.* Accord *Hoffa v. United States*, 385 U.S. 293 (1966). In *Hoffa*, the Supreme Court decided that when a person misplaces his or her trust by voluntarily giving incriminating information to another, the information is not entitled to fourth amendment protection if later revealed to law enforcement officials. *Id.* at 302-03.

24. See *Abel v. United States*, 362 U.S. 217, 241 (1960).

25. 649 F.2d 731 (9th Cir.), *cert. denied*, 454 U.S. 970 (1981).

done."<sup>26</sup> In *Diggs*, evidence was seized from the defendant's motel room, which had been his residence while he had engaged in certain illegal activity.<sup>27</sup> The trial court denied his motion to suppress the evidence, finding that the seized property had been abandoned.<sup>28</sup>

On appeal, the Ninth Circuit held that there was sufficient evidence demonstrating that Diggs no longer had a reasonable expectation of privacy in the articles.<sup>29</sup> The court based its finding of abandonment on the following facts: Diggs owed \$1000 in back rent when he left the motel room, the motel had terminated his tenancy after receiving the key to his room in the mail, and Diggs never attempted to retrieve any of the articles he left in the room.<sup>30</sup>

A residence may be found to be abandoned even when a person possesses a *subjective* or *undisclosed* intent to return. In *United States v. Sledge*,<sup>31</sup> the Ninth Circuit affirmed the trial court's denial of the defendants' motion to suppress drug paraphernalia seized from their apartment during a warrantless search.<sup>32</sup> On March 1, 1979 the defendants gave thirty days' notice to their landlord of their intent to vacate their apartment.<sup>33</sup> The rent had been paid through March.<sup>34</sup> Approximately March 15, the landlord went to the apartment to inquire when the defendants were planning to leave.<sup>35</sup> Finding no one at home, the landlord left a note requesting the defendants to telephone him.<sup>36</sup> They did not comply with his requests, nor did they answer his subsequent phone calls.<sup>37</sup> On March 29, the landlord again returned to the apartment and found the front door open, but no one present inside.<sup>38</sup> The next day, the landlord found the apartment completely empty of the defendants' furnishings and food.<sup>39</sup> Concluding that the apartment had been vacated, the landlord recovered possession, began to clean the apartment, and discovered various chemicals in a box.<sup>40</sup>

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26. *Id.* at 735 (citing *United States v. Haddad*, 558 F.2d 968, 975 n.6 (9th Cir. 1977); *United States v. Wilson*, 472 F.2d 901, 903 (9th Cir.), *cert. denied*, 414 U.S. 869 (1973)).

27. 649 F.2d at 734-35.

28. *Id.* at 735.

29. *Id.*

30. *Id.*

31. 650 F.2d 1075 (9th Cir. 1981).

32. *Id.* at 1082.

33. *Id.* at 1075.

34. *Id.* at 1076.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

The landlord then called a DEA agent who searched the apartment and seized the drug paraphernalia.<sup>41</sup> The Ninth Circuit upheld the warrantless search and seizure, ruling that although the defendants may have possessed a subjective or undisclosed intent to return, the officer had reasonable grounds to conclude that the apartment had been abandoned.<sup>42</sup>

### 5. Prison searches

Prisoners' fourth amendment rights are *extremely limited*.<sup>43</sup> The Ninth Circuit has ruled, however, that even a prisoner has a reasonable expectation of privacy in a sealed letter unless the warrantless seizure of the letter "serves a justifiable purpose of imprisonment or prison security."<sup>44</sup>

In *United States v. Vallez*,<sup>45</sup> defendant Molina argued that a partially sealed letter seized from his prison cell without a warrant should have been suppressed at his murder trial.<sup>46</sup> The letter was discovered during a cell-by-cell search which was prompted by information that an escape plan was underway.<sup>47</sup> Prison regulations allowed such security searches "to detect contraband, prevent escapes, maintain sanitary conditions and to eliminate fire and safety hazards."<sup>48</sup> The Ninth Circuit upheld the warrantless search because it was conducted under a prison regulation "reasonably designed to promote prison security,"<sup>49</sup> and it went no further than necessary to effect this purpose.<sup>50</sup>

### B. State Action

Searches and seizures conducted by private parties do not normally implicate the fourth amendment.<sup>51</sup> An exception arises, how-

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41. *Id.*

42. *Id.* at 1081-82.

43. See *United States v. Savage*, 482 F.2d 1371, 1373 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974).

44. *Id.* at 1373.

45. 653 F.2d 403 (9th Cir. 1981).

46. *Id.* at 406.

47. *Id.*

48. *Id.*

49. *Id.* (citing *United States v. Dawson*, 516 F.2d 796, 806 (9th Cir.), *cert. denied*, 423 U.S. 855 (1975)).

50. 653 F.2d at 406.

51. *Walter v. United States*, 447 U.S. 649, 656 (1980) (wrongful search or seizure by private party did not constitute fourth amendment violation) (citing *Burdeau v. Mc Dowell*, 256 U.S. 465, 475 (1921)); *Coolidge v. New Hampshire*, 403 U.S. 443, 488 (1971) ("some type of unconstitutional *police conduct*" is necessary for the fourth amendment to apply) (emphasis added).

ever, when such a party has acted as an instrument or agent of the state.<sup>52</sup> The Ninth Circuit has identified two factors to be utilized in assessing the applicability of the fourth amendment when a private party is alleged to have committed a constitutional violation: "[1] the government's *knowledge* and *acquiescence* [in the search] and [2] the *intent* of the party performing the search."<sup>53</sup>

In *United States v. Walther*,<sup>54</sup> the Ninth Circuit found state action when Rivard, an airline employee, opened an overnight case and discovered a white powder later confirmed to be cocaine. Rivard contacted a DEA agent who arrested defendant Walther when she arrived that evening to claim the package. Rivard had previously provided the DEA with information in return for payment. At Walther's suppression hearing Rivard testified that he had no reason *not* to expect payment for notifying the DEA about the contents of Walther's case.<sup>55</sup>

The Ninth Circuit found Rivard's past contacts with the DEA extensive enough to establish the DEA's acquiescence in the search.<sup>56</sup> On ten prior occasions, Rivard had opened packages in which he had discovered drugs and reported this information to the DEA.<sup>57</sup> Moreover, the DEA had established a confidential informant file on Rivard relating to his reports on individuals who fit the DEA's drug courier profile.<sup>58</sup> Based on these facts, the court concluded that although the DEA did not have any knowledge regarding the search in question, that agency had encouraged, as well as acquiesced in, Rivard's activity.<sup>59</sup> In addition, the circuit court noted that the *intent* factor was satisfied based on the fact that suspicion of illegal activity was the "only" reason for the private party search.<sup>60</sup>

In *United States v. McGreevy*,<sup>61</sup> the Ninth Circuit held that an off-duty police officer employed as a security guard may conduct a war-

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52. *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971) ("The test . . . is whether, . . . in light of all the circumstances of the case, [a private party] must be regarded as having acted as an 'instrument' or agent of the state . . .").

53. *United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981) (emphasis added). These factors were derived from the court's examination of previous cases wherein the "instrument or agent" test was applied to a wide variety of factual situations. *Id.*

54. 652 F.2d 788 (9th Cir. 1981).

55. *Id.* at 790.

56. *Id.* at 793.

57. *Id.* at 790.

58. *Id.*

59. *Id.* at 793. "The DEA thus had knowledge of a particular pattern of search activity dealing with a specific category of cargo, and had acquiesced in such activity."

60. *Id.* at 792.

61. 652 F.2d 849 (9th Cir. 1981).

rantless search without violating the fourth amendment if he is not acting "under color of state law." In *McGreevy*, Petrie performed security services for Federal Express while off-duty from his full-time employment as a police officer. In his capacity as a security officer, he made a warrantless search of the defendant's package and seized drugs found inside.

The defendant claimed that Petrie was acting as a government agent while conducting the search and that the drugs should have been suppressed because of the warrantless seizure.<sup>62</sup> The Ninth Circuit ruled, however, that because Petrie was not acting "under color of state law," the search was outside the scope of the fourth amendment.<sup>63</sup> The court rested its decision on three facts: Petrie did not hold his position with Federal Express because he was a police officer; he had "carefully separated the two jobs"; and he was unaware of any understanding between Federal Express and the DEA for the disposal of contraband.<sup>64</sup>

### C. *Sufficiency of Search Warrants*

The determination of whether probable cause exists to support a search warrant requires a magistrate to draw inferences independently from facts presented by an affiant officer.<sup>65</sup> In *United States v. Stefanson*,<sup>66</sup> the Ninth Circuit summarily dismissed Stefanson's contention that an oral affidavit failed to allege facts sufficient to establish probable cause to search his home for illegal firearms, ammunition, and drugs.<sup>67</sup> The affidavit stated that on the day the warrant was issued,

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62. *Id.* at 851.

63. *Id.*

64. *Id.*

65. See *Giordenello v. United States*, 357 U.S. 480, 486 (1958); *Johnson v. United States*, 333 U.S. 10, 14 (1948) (by implication).

66. 648 F.2d 1231 (9th Cir. 1981).

67. *Id.* at 1236. Stefanson also challenged the warrant's validity for failure to comply with several requirements of FED. R. CRIM. P. 41(c)(2)(D):

When a caller informs the Federal magistrate that the purpose of the call is to request a warrant, the Federal magistrate shall *immediately* place under oath each person whose testimony forms a basis of the application and each person applying for that warrant. If a voice recording device is available, the Federal magistrate shall record by means of such device all of the call after the caller informs the Federal magistrate that the purpose of the call is to request a warrant. Otherwise a stenographic or longhand verbatim record shall be made.

*Id.* at 1234-35 (quoting FED. R. CRIM. P. 41(c)(2)(D) (emphasis in case)).

Stefanson first argued that the magistrate's failure to place the affiant under oath before accepting his testimony invalidated the warrant. The court held that the violation was only "technical"; the accepted Ninth Circuit standard requires that the violation be either prejudicial or deliberate before evidence may be suppressed. *Id.* at 1235. Because the magistrate

Stefanson had been arrested one mile from his home for illegally possessing firearms, ammunition, and narcotics; that similar illegal drugs and firearms had been found in Stefanson's home just over a year before the current arrest; that Stefanson had been previously convicted of possession of firearms and ammunition and of drug related offenses; and that a shooting had occurred outside his home eight days before the present arrest.<sup>68</sup> The affiant further stated that sixteen years of experience led him to conclude that persons carrying illegal drugs and firearms are likely to have a large "cache" at their residence.<sup>69</sup>

### 1. Timeliness

Probable cause to seize any items must exist at the time a warrant is issued.<sup>70</sup> The validity of such a warrant then continues only for such time as a reasonable person would believe that the items to be seized are still in the indicated place.<sup>71</sup>

In *United States v. Reid*,<sup>72</sup> the defendant argued that the facts in the affidavit failed to establish probable cause to believe that the items to be seized were in the place stated in the warrant.<sup>73</sup> Although the warrant was recent, the facts supporting it were over a year old. In upholding the magistrate's finding of probable cause, the Ninth Circuit stressed that factors other than the mere passage of time bear on

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was unaware of the oath requirement, the violation was not deliberate. Moreover, because the oath was given at the end of the call, the violation was not prejudicial. *Id.* at 1234. *But see* *United States v. Shorter*, 600 F.2d 585 (6th Cir. 1979) (suppression required because oath given after oral information).

Stefanson also argued that the magistrate's failure to transcribe verbatim the telephonic conversation rendered the warrant invalid. The magistrate testified that "he dictated the probable cause statement from the tape of the original conversation supplemented by his memory." 648 F.2d at 1235. He further testified that there was no conflict between the tape and his memory of the conversation and that any unclear portions of the tape had been deleted from the transcript. The magistrate certified the accuracy of the conversation, and the defendant stipulated to the transcription's substantial accuracy. *Id.* Because the magistrate had acted in good faith, and no prejudice had been demonstrated, this violation was also considered merely technical. *Id.* at 1236.

Stefanson finally charged that the magistrate was not acting impartially when he authorized night-time execution of the warrant. *Id.* The court found, however, that the risk that the contraband might be destroyed justified a night-time search. *Id.*

68. *Id.* at 1233.

69. *Id.* at 1233-34.

70. *Sgro v. United States*, 287 U.S. 206, 211 (1932); *United States v. Steeves*, 525 F.2d 33, 37 (8th Cir. 1975).

71. *United States v. Brinklow*, 560 F.2d 1003, 1005 (10th Cir. 1977). "Probable cause ceases to exist when it is no longer reasonable to presume that items once located on the premises are still there." *Id.*

72. 634 F.2d 469 (9th Cir. 1980).

73. *Id.* at 472.

whether particular items to be seized would likely remain at the stated place. The nature of the criminal activity involved, as well as the property to be seized, may offset a rather lengthy passage of time.<sup>74</sup>

On May 10, 1978, Postal Inspector Hall applied for and obtained a warrant to search the Eden Press offices. The affidavit stated that during February and March 1977, Detective Corbin made several mail order purchases from Eden Press of birth certificates, books, catalogues, and identification cards listing fictitious names, addresses, and birth dates next to photographs of police personnel. In August 1977, Hall ordered and received an identification card and three birth certificates in the name of Thomas C. Rossi. On May 2, 1978, Hall interviewed two Eden Press employees, who described the processing of mail orders and provided a detailed description of the layout and contents of the Eden Press offices. Hall visited the offices on May 5, 1978 and observed a camera and twenty-five to fifty identification cards with photographs attached and personal data typed in, as well as several boxes and files.<sup>75</sup>

The court held that these facts established probable cause to believe that business records, a camera, and laminating machine, "mock-ups" of identification cards, stocks of blank identification cards, and birth certificates could be found on May 10, 1978, at the Eden Press offices.<sup>76</sup> The court explained that the magistrate could reasonably have expected that business records would be found at the offices, because such records are generated and maintained in the ordinary course of business at such a location.<sup>77</sup> The court also found probable cause with respect to the camera, laminating machine, and mock-ups because the affiant had personally observed these items.<sup>78</sup> Finally, the court found that the lapse of time between the ordering date of the blank identification cards and birth certificates, and the execution date of the search warrant had not destroyed probable cause with respect to these items because it was reasonable to believe that absent depletion they would have been stored at the company offices.<sup>79</sup>

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74. *Id.* at 473 (citing *United States v. Steeves*, 525 F.2d 33, 38 (8th Cir. 1975) (time lapse between robbery and date warrant issued not destructive of probable cause where stolen revolver, ski mask, and clothing could reasonably be found at defendant's home); *United States v. Lucarz*, 430 F.2d 1051, 1055 (9th Cir. 1970) (probable cause found where the stolen materials were the sort "one would expect to be hidden" at defendant's home and where defendant had ample opportunity to return home to hide them)).

75. 634 F.2d at 471-72.

76. *Id.* at 472-73.

77. *Id.*; accord *Andresen v. Maryland*, 427 U.S. 463, 478 n.9 (1976).

78. 634 F.2d at 473.

79. *Id.*; see *United States v. Steeves*, 525 F.2d 33, 38 (8th Cir. 1975).

## 2. Particularity

The particularity requirement prohibits general searches and seizures of items that are not described in the warrant.<sup>80</sup> Even when the warrant is supported by probable cause and specifies the alleged offense, the executing officer has no discretion concerning what may be seized.<sup>81</sup> Moreover, when items such as books are sought and "the basis for their seizure is the ideas which they contain,"<sup>82</sup> the particularity requirement must be accorded "scrupulous exactitude."<sup>83</sup>

A general warrant may, however, meet the particularity requirement if it incorporates a specific, accompanying affidavit.<sup>84</sup> In *In re Property Belonging to Talk of the Town Bookstore, Inc.*,<sup>85</sup> the district court granted a motion to suppress evidence obtained pursuant to two search warrants because the warrants were unconstitutionally general.<sup>86</sup> The warrants directed the executing officers to seize only the property specified in the *attached* affidavits, and "to seize only those books, magazines, and films which depict the specific sex acts described in the Affidavits."<sup>87</sup>

The Ninth Circuit concluded that the generality of the warrant was cured by the attached and incorporated affidavits.<sup>88</sup> The court explained that an attached and incorporated affidavit limits the generality of the warrant by circumscribing the executing officers' discretion, and by notifying the person being searched of the specific items that the officer is entitled to seize.<sup>89</sup> Because the warrant expressly limited the seizure to those items *specifically* described in the incorporated affidavits, the warrant met the standard of "the most scrupulous exactitude," applicable when first amendment rights are involved.<sup>90</sup>

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80. *Marron v. United States*, 275 U.S. 192, 196 (1927) (seizure of ledgers and bills not described in warrant violated fourth amendment).

81. *Id.*

82. *Stanford v. Texas*, 379 U.S. 476, 485 (1965) (footnote omitted).

83. *Id.* (warrant authorizing seizure of books, records, pamphlets, memoranda, pictures, and other written instruments concerning the Communist Party held unconstitutionally general).

84. *United States v. Johnson*, 541 F.2d 1311, 1315 (8th Cir. 1976) (per curiam); see *United States v. Drebin*, 557 F.2d 1316, 1322 (9th Cir. 1977); accord *United States v. Marti*, 421 F.2d 1263, 1269 (2d Cir. 1970).

85. 644 F.2d 1317 (9th Cir. 1981).

86. *Id.* at 1318.

87. *Id.* at 1319.

88. *Id.*

89. *Id.*

90. *Id.* (citing *Stanford v. Texas*, 379 U.S. 476, 485 (1965)).



### 3. Affidavits based on hearsay

In *Aguilar v. Texas*,<sup>91</sup> the Supreme Court set forth a two part test for determining probable cause when an affidavit supporting a warrant is based on hearsay information. First, the magistrate must be informed of the underlying circumstances that the informant relied on in reaching his or her conclusion. Second, the magistrate must be informed of the underlying circumstances from which the affiant concluded that the informant was credible or that the information was reliable.<sup>92</sup> If the informant's tip fails to satisfy the *Aguilar* standard, the magistrate may still find probable cause if the tip is sufficiently corroborated by independent evidence,<sup>93</sup> or if the tip is *sufficiently detailed* as to indicate the reliability of the information.<sup>94</sup> When there is a substantial basis for believing the hearsay, courts should interpret the affidavit in a sensible and realistic manner.<sup>95</sup>

In *United States v. Ellsworth*,<sup>96</sup> members of the public were eyewitnesses to Ellsworth's assault on a federal officer.<sup>97</sup> In their affidavits, these witnesses identified Ellsworth and described him as having worn dark gloves and a T-shirt bearing the words "Satisfaction Guaranteed."<sup>98</sup> From this information, the Ninth Circuit summarily concluded that there was a sufficient factual basis for the magistrate to conclude that Ellsworth's *house* was the probable location of critical evidence.<sup>99</sup> The decision rested primarily on the fact that the information was provided by witnesses from the general public.<sup>100</sup> Ellsworth's indictment for the assault also supported the finding of probable cause.<sup>101</sup>

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91. 378 U.S. 108 (1964).

92. *Id.* at 114.

93. *Spinelli v. United States*, 393 U.S. 410, 415 (1969).

94. *Id.* at 416-17 (citing *Draper v. United States*, 358 U.S. 307, 313 (1959)).

95. *United States v. Ventresca*, 380 U.S. 102, 108-09 (1965). Affidavits are usually drafted by nonlawyers in the "midst and haste" of a criminal investigation. A hypertechnical interpretation will discourage police officers from submitting their evidence to a magistrate before acting. *Id.* at 108.

96. 647 F.2d 957 (9th Cir. 1981).

97. *Id.* at 963.

98. *Id.* at 959.

99. *Id.* at 963. It is unclear how this information alone would suggest Ellsworth's house as a probable location. The court did not indicate the manner in which this information would satisfy the first prong of the *Aguilar* test relating to the *probable location* of incriminating evidence. *See Aguilar v. Texas*, 378 U.S. at 114.

100. 647 F.2d at 963.

101. *Id.* (citing *United States v. Sevier*, 539 F.2d 599, 603 (6th Cir. 1976)). The magistrate, as well as the court, can take judicial notice of an indictment. However, a magistrate may not rest a finding of probable cause on the mere fact that an individual was previously

In *United States v. Davis*,<sup>102</sup> an investigation into the murder of Davis' "disaffected associate" resulted in the issuance of warrants to search Davis' business and residence.<sup>103</sup> The affidavits contained information supplied by three informants. The first informant provided personal observations regarding the murder plan, details of persons involved in conversations, and the times and locations of the conversations. The second informant disclosed conversations with Davis concerning a drug conspiracy, and the third informant supplied information corroborating the first informant's disclosures. Significantly, the first and third informants provided information against their interests.<sup>104</sup> The court found that all three were credible and that their information was sufficiently detailed to support the magistrate's finding of probable cause.<sup>105</sup>

#### 4. Misstatements and omissions

When the validity of the affidavit is challenged because it contains misstatements or omissions by the informant or affiant, the defendant must show that any false statements were intentionally or recklessly made, and that the affidavit, purged of its misstatements, would not support a finding of probable cause.<sup>106</sup> Three recent Ninth Circuit cases, *United States v. Davis*,<sup>107</sup> *United States v. Willis*,<sup>108</sup> and *United States v. Maher*,<sup>109</sup> involved omissions and misstatements of fact that allegedly rendered the affidavits constitutionally deficient.

The defendant in *Davis* argued that the warrant to search his business offices contained misstatements by the affiant, Epstein, to the effect that the first and third informants had no known pending cases against them. In reality, Davis contended, the affiant was present when the informants had been advised that they were suspects in a murder conspiracy.<sup>110</sup> The court dismissed Davis' contention, noting the difference

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indicted. The obvious rationale behind such a rule is that a grand jury determines only whether there is sufficient evidence to cause an accused to stand trial, not whether probable cause exists to search. 647 F.2d at 964 (citing *United States v. Levinson*, 405 F.2d 971, 980 (6th Cir. 1968)).

102. 663 F.2d 824 (9th Cir. 1981).

103. *Id.* at 827.

104. *Id.* at 829.

105. *Id.*

106. *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978); *United States v. Lefkowitz*, 618 F.2d 1313, 1317 n.3 (9th Cir. 1980).

107. 663 F.2d 824 (9th Cir. 1981).

108. 647 F.2d 54 (9th Cir. 1981).

109. 645 F.2d 780 (9th Cir. 1981) (per curiam).

110. 663 F.2d at 829.

between one who is a suspect and one who has a case pending against him or her.<sup>111</sup>

Davis also attacked the warrant to search his residence on the basis that the affiant, Thompson, did not have personal knowledge of the facts recited in the affidavit.<sup>112</sup> Although Epstein had executed the affidavit for the office warrant, Thompson signed the same affidavit for the warrant to search Davis' residence, without changing the wording of the affidavit from the first person singular.<sup>113</sup> The court reluctantly concluded that even though there was no offer of proof that the information given by the two affiants differed, the Supreme Court's ruling in *Franks v. Delaware*<sup>114</sup> mandated an evidentiary hearing in the *Davis* case.<sup>115</sup>

In *Willis*, much of the information recited in the affidavit had been provided by Willis' former live-in girlfriend. The affiant remained unaware, however, that she had also been having sexual relations with the state narcotics officer who arrested Willis.<sup>116</sup> Based on the affiant's lack of knowledge, the court found that the omission of this fact from the affidavit had not been reckless or intentional.<sup>117</sup> The court relied on an earlier decision, *United States v. Lefkowitz*,<sup>118</sup> in which it held that unintentional or nonreckless omissions will not vitiate an affidavit that would have provided probable cause if the omitted information had been included.<sup>119</sup> The court found that disclosure of the informant's possible bias was not essential to the establishment of probable cause because her information was detailed and first-hand, because she was in a position to know the facts she had asserted, and because her statements had subjected her to penal and personal risk.<sup>120</sup>

The defendant in *Maher* challenged the affidavit because the affiant had failed to state that the informant, in directing the agents to the

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111. *Id.*

112. *Id.*

113. *Id.*

114. 438 U.S. 154 (1978).

115. 663 F.2d at 830.

116. 647 F.2d at 55.

117. *Id.* at 58.

118. 618 F.2d 1313 (9th Cir. 1980).

119. *Id.* at 1317. In *Lefkowitz*, the affiant neither intentionally nor recklessly omitted the fact that one of the informants was the defendant's estranged wife. Even if her identity had been revealed, the affidavit indicated that she had personally heard and observed the information she asserted, that her information was highly detailed and independently corroborated by information known to the IRS, and that her information had subjected her to penal consequences. *Id.* at 1316-17.

120. 647 F.2d at 58-59.

vehicle to be searched, incorrectly named a motel.<sup>121</sup> The court found this contention meritless, noting that even deliberate falsehoods must be material to vitiate a warrant.<sup>122</sup> Because the agents easily located the vehicle by following other directions supplied by the informant, the omission was considered immaterial.<sup>123</sup>

#### D. Warrantless Searches

The chief evil at which the fourth amendment is directed is physical entry of the home.<sup>124</sup> Therefore, warrantless searches and seizures of a residence have been held to be per se unreasonable in the absence of consent or exigent circumstances.<sup>125</sup>

In *Steagald v. United States*,<sup>126</sup> the Supreme Court held that absent exigent circumstances or consent, police officers may not effect a warrantless search for the subject of an arrest warrant in a third party's home.<sup>127</sup> DEA agents entered Steagald's home seeking Ricky Lyons, the subject of an arrest warrant. Lyons was not found, but an agent observed cocaine. This discovery prompted an application for a warrant to search Steagald's house. Before the warrant was obtained, a second search uncovered additional incriminating evidence. A third search, conducted pursuant to a warrant, uncovered forty-three pounds of cocaine. Steagald moved to suppress the evidence obtained during the warrantless search.<sup>128</sup>

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121. 645 F.2d at 782.

122. *Id.* See *United States v. Young Buffalo*, 591 F.2d 506, 510 (9th Cir.) (affidavit purged of immaterial, unintentional, and nonreckless omissions and misstatements still had to establish probable cause), *cert. denied*, 441 U.S. 950 (1979).

123. 645 F.2d at 781-82.

124. *Payton v. New York*, 445 U.S. 573, 585 (1980) (citing *United States v. United States District Court*, 407 U.S. 297, 313 (1972)).

125. *Coolidge v. New Hampshire*, 403 U.S. 443, 474-75 (1971). See, e.g., *United States v. Santana*, 427 U.S. 38 (1976) (upholding warrantless entry into suspect's home to prevent destruction of evidence); *Warden v. Hayden*, 387 U.S. 294 (1967) (upholding warrantless search by officers in hot pursuit of suspected armed felon who had entered house only a few minutes before officers' arrival).

126. 451 U.S. 204 (1981).

127. *Id.* at 211. An arrest warrant carries with it the limited authority to enter a suspect's home when there is reason to believe that the suspect is within. *Payton v. New York*, 445 U.S. at 603.

The Court refused to consider the Government's argument that Steagald lacked a legitimate expectation of privacy in his house. The Government lost the right to argue this point by making contrary assertions in the lower courts and by acquiescing to contrary findings by those courts. 451 U.S. at 208-09.

128. *Id.* at 206-07. The district court denied the motion, finding the arrest warrant sufficient to justify the entry and search. The Court of Appeals for the Fifth Circuit affirmed, 606 F.2d 540 (5th Cir. 1979), relying on *United States v. Cravero*, 545 F.2d 406 (5th Cir.

The Court explained that the purpose of the warrant requirement is to interpose a neutral judicial officer between zealous police and the citizen.<sup>129</sup> While protecting distinct interests, both an arrest warrant and a search warrant interpose neutral review. An arrest warrant protects against unreasonable seizures, while a search warrant protects against unreasonable intrusions into an individual's privacy in his home and possessions.<sup>130</sup>

The Court thus reasoned that although the arrest warrant protected Lyons from an unreasonable seizure, Steagald's privacy interest merited only the protection of an agent's determination of probable cause. From Steagald's perspective, the search pursuant to the arrest was no more reasonable than the warrantless search.<sup>131</sup> Moreover, because there was sufficient time to obtain a warrant and because of the absence of consent or exigent circumstances, there was no justification for the warrantless search. The search, therefore, unquestionably violated Steagald's fourth amendment rights.<sup>132</sup>

Citing *Semayne's Case*,<sup>133</sup> the dissent contended that at common law an officer could enter the home of a third party to apprehend the subject of an arrest warrant.<sup>134</sup> The emphasis in *Semayne's Case*, however, was on preventing *the subject of an arrest warrant* from obtaining sanctuary from arrest in a third party's home.<sup>135</sup> The dissent's reliance on this authority, therefore, seems misplaced, given the fact that the issue before the Court was whether *a third party* could complain of the search.<sup>136</sup>

The dissent also contended that because fugitives are inherently mobile, officers will be forced to return to the magistrate several times before effecting an arrest.<sup>137</sup> The Court adequately responded to this

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1976), *cert. denied*, 430 U.S. 983 (1977), wherein it was held that a valid arrest warrant, when coupled with the officer's reasonable belief that the subject is within a third party's premises, is sufficient to justify a search of those premises. 545 F.2d at 421.

129. 451 U.S. at 212 (citing *Johnson v. United States*, 333 U.S. 10, 14 (1948)).

130. 451 U.S. at 213.

131. *Id.* at 213-16.

132. *Id.* at 216. A contrary conclusion would create a significant potential for abuse: the police could search the homes of the individual's friends, *see, e.g.*, *Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966), or the arrest warrant could serve as the pretext for entering a home when there is no probable cause to believe that criminal activity is afoot. *See Chimel v. California*, 395 U.S. 752, 767 (1969).

133. 77 Eng. Rep. 194, 198 (K.B. 1603).

134. 451 U.S. at 227-28 (Rehnquist, J., dissenting).

135. *Id.* (citing 1 J. CHITTY, CRIMINAL LAW 57 (1816); M. FOSTER, CROWN CASES 320 (1762); 2 M. HALE, PLEAS OF THE CROWN 117 (1736)).

136. 451 U.S. at 212.

137. *Id.* at 225 (Rehnquist, J., dissenting).

argument, noting that situations such as that in the case at bar arise infrequently because (1) a warrant is not required to arrest a suspected felon in a public place; (2) only an arrest warrant is required when police arrest a suspect in his own home; and (3) the exigent circumstances doctrine permits warrantless entry in hot pursuit.<sup>138</sup> Furthermore, any remaining practical problems did not, in the opinion of the Court, outweigh the constitutional interests at stake.<sup>139</sup>

The dissent was scathing in its criticism of the majority's position,<sup>140</sup> contending that *Steagald* would result in the apprehension of fewer criminals.<sup>141</sup> Although it was primarily concerned that fugitives would exploit the additional time required to obtain search and arrest warrants,<sup>142</sup> the dissent did acknowledge that the impact of the Court's ruling on law enforcement would be slight.<sup>143</sup>

In short, *Steagald* prohibits the use of evidence against a third party obtained by law enforcement officers as the collateral benefit of a search for a fugitive in the third party's home. Only evidence against the *third party* may be suppressed under *Steagald*, not evidence against the subject of the arrest warrant. Whatever impact the Court's holding will have on the execution of an arrest warrant depends upon whether the exigent circumstances doctrine applies,<sup>144</sup> permitting warrantless entry in hot pursuit.

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138. *Id.* at 226. The "hot pursuit" doctrine may, in fact, lessen the impact of *Steagald*.

139. *Id.* at 224.

140. Justice Rehnquist characterized the majority opinion as proceeding in a "pristinely simple manner," 451 U.S. at 223, as employing a "simple Aristotelian syllogism," *id.* at 224, as giving "beguilingly simple answers" to the law enforcement problem which it would create, *id.* at 225, and as having an "ivory tower misconception" of the true realities of the case. *Id.* at 226.

141. *Id.* Rehnquist argued: "[i]ncidental infringements of distinct Fourth Amendment interests may, however, be reasonable when they occur in the course of executing a valid warrant addressed to other interests." *Id.* at 224. Rehnquist relied on *Dalia v. United States*, 441 U.S. 238 (1979), in which a covert entry to install electronic surveillance equipment was held not to violate fourth amendment interests even though the court authorizing the surveillance did not explicitly authorize the entry. In bugging authorizations, however, entry is *clearly* implicit. 451 U.S. at 226.

142. *Id.* "[T]he object of arrest may flee at anytime — including the 'short time' during which the police are endeavoring to obtain a search warrant." *Id.*

143. *Id.* at 231. "The genuinely unfortunate aspect of today's ruling is not that fewer fugitives will be brought to book, or fewer criminals apprehended, though both of these consequences will undoubtedly occur . . . ." *Id.*

144. The "exigent circumstances" doctrine recognizes the reasonableness of a warrantless entry where there is a "compelling need for official action and no time to secure a warrant." *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (citing *Warden v. Hayden*, 387 U.S. 294 (1967)). "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." 387 U.S. at 298-

## 1. Consent searches

Searches conducted pursuant to consent are one of the few well-settled exceptions to the fourth amendment warrant requirement.<sup>145</sup> Such searches are valid, however, only when consent is given voluntarily and free of duress or coercion.<sup>146</sup> The "voluntariness" of consent is determined from the totality of the circumstances.<sup>147</sup> This, in turn, necessitates an inquiry into the characteristics of the individual defendant, as well as the circumstances of the particular interrogation.<sup>148</sup> In three recent decisions, the Ninth Circuit addressed the subject of consent searches and their voluntariness.

In *United States v. Tavelman*,<sup>149</sup> defendant Tavelman allowed five DEA agents into his hotel room. He balked, however, at letting them search the bathroom where he had set up a cocaine laboratory. He was then arrested and advised of his *Miranda* rights. After trying unsuccessfully to contact his attorney, Tavelman allowed the arresting agent to search the bathroom. The trial court found the consent voluntary, and the Ninth Circuit affirmed under the "clearly erroneous" stan-

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99. Thus, when speed is essential "to prevent the dangers that the suspect at large in the house may resist or escape," the warrant requirement may be circumvented. *Id.* at 299.

*But see* *Payton v. New York*, 445 U.S. 573 (1980) (warrantless entry into private residence to effect arrest unreasonable when there is ample time to obtain a warrant); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (warrantless search of automobile unreasonable when defendant had opportunity to destroy incriminating evidence and police had long known of probable role of car).

145. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973).

146. *Id.* at 222.

147. *Id.* at 227.

148. *Id.* at 226-27. When an accused is actually in police custody, courts are particularly sensitive to the heightened possibility that consent was obtained as a result of coercion. *Id.* at 240-41 n.29. *See also* *Villano v. United States*, 310 F.2d 680, 684 (10th Cir. 1962) (quoting *United States v. Page*, 302 F.2d 81, 84 (9th Cir. 1962): "'Coercion is implicit in situations where consent is obtained under color of the badge . . . '"); *Judd v. United States*, 190 F.2d 649, 651 (D.C. Cir. 1951) (consent obtained after arrest or display of official authority deemed a product of intimidation or duress). Even a written and signed consent to search will be invalidated in these circumstances if the search was not sufficiently attenuated from unconstitutional conduct by authorities. *See United States v. Taheri*, 648 F.2d 598 (9th Cir. 1981), wherein the Ninth Circuit excluded evidence obtained pursuant to a written and signed consent to search. According to the court, neither defendant's receipt of *Miranda* warnings prior to giving consent, nor the consent itself was sufficient to purge the taint of his illegal arrest. *Id.* at 601.

*But see United States v. Wellins*, 654 F.2d 550 (9th Cir. 1981), in which the Ninth Circuit found the requisite attenuation based on the following: (1) defendant's receipt of *Miranda* rights; (2) defendant's receipt of advice from his attorney to remain silent; and (3) defendant's relaxed and calm demeanor. *Id.* at 555-57.

149. 650 F.2d 1133 (9th Cir. 1981), *cert. denied*, 455 U.S. 939 (1982).

dard.<sup>150</sup> The court noted (1) that Tavelman gave indicia of consent when the agents came to his hotel room door and (2) that his election to contact his attorney at a time when he may have reasonably suspected that the investigation was focusing on him demonstrated that he understood his *Miranda* rights.<sup>151</sup>

In *United States v. Perez*,<sup>152</sup> customs officers separated and interrogated defendants at gunpoint, without advising them of their *Miranda* rights. The officers asked if they might search the defendants' truck, and one of the men agreed. The officers returned to the truck with the defendants and again asked and received consent to search it. Four pounds of heroin were discovered in the vehicle.<sup>153</sup>

The court concluded that the Government had failed to prove that the consent was voluntary,<sup>154</sup> reasoning that the burden of proving voluntariness of consent given at gunpoint was insurmountable.<sup>155</sup>

In contrast, the Ninth Circuit, in *United States v. Bramble*,<sup>156</sup> found voluntary consent present under circumstances ostensibly more coercive than those present in *Perez*. Bramble was arrested, handcuffed, and forced to lie face down on the ground. Two officers surrounded him with their weapons pointed towards him. A DEA agent then placed Bramble in a chair and obtained his consent to search the vehicle he had been driving.<sup>157</sup> The court conceded that the circumstances were coercive.<sup>158</sup> However, because Bramble had stated that he wished to be present during the search to protect his dog, the court

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150. *Id.* at 1136, 1138-39. "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Page*, 302 F.2d 81, 85 (9th Cir. 1962) (citing *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948)). Applying this standard in *United States v. Wasserteil*, 641 F.2d 704 (9th Cir. 1981), the Ninth Circuit held that the trial court's finding of voluntary consent to search was not "clearly erroneous" where evidence showed that the defendant was a sophisticated businessman who was subjected to neither prolonged interrogation nor physical punishment, and where he had been informed of his right to refuse consent. *Id.* at 707. Similarly, in *United States v. O'Looney*, 544 F.2d 385 (9th Cir.), *cert. denied*, 429 U.S. 1023 (1976), the Ninth Circuit concluded under essentially the same circumstances that the trial court's finding of voluntariness was not "clearly erroneous." In *O'Looney*, the defendant was also a sophisticated businessman who often sought legal advice, and, like Wasserteil, was not subjected to a lengthy detention, to prolonged interrogation, or to physical punishment. *Id.* at 388.

151. 650 F.2d at 1138.

152. 644 F.2d 1299 (9th Cir. 1981).

153. *Id.* at 1301.

154. *Id.* at 1302.

155. *Id.* at 1303.

156. 641 F.2d 681 (9th Cir. 1981).

157. *Id.* at 683.

158. *Id.*



concluded that the defendant had given his consent to prevent harm to the animal; Bramble could not, therefore, later complain that the consent had been involuntary.<sup>159</sup>

## 2. Border searches

Border officials may conduct a warrantless interrogation of any alien, or person believed to be an alien, regarding his or her right to be present in the United States.<sup>160</sup> Such officials may also conduct warrantless searches for aliens in any railway car, aircraft, conveyance, or vehicle.<sup>161</sup> The authority to conduct border searches subject to relaxed fourth amendment standards stems from a congressional determination that some measure of an individual's right to privacy must yield to a superior national right of security.<sup>162</sup> This broad discretion to conduct warrantless searches has been limited, however, to the border or its functional equivalent,<sup>163</sup> and is subject to the test of "reasonable suspicion."<sup>164</sup>

In *United States v. Cortez*,<sup>165</sup> the Supreme Court recently expanded the "reasonable suspicion" test to "reasonable surmise."<sup>166</sup> In *Cortez*, border patrol officers spotted a distinctive "chevron" shoeprint leading from the Mexican border to an isolated point on a United States highway.<sup>167</sup> Relying upon information that the area was heavily travelled by aliens entering the United States illegally, and upon the fact that the path led over obstacles that would have been avoided in daylight, the officers deduced that someone was leading a group of illegal aliens into the United States.<sup>168</sup> Officers then established a surveil-

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159. *Id.*

160. 8 U.S.C. § 1357(a)(1) (1970).

161. 8 U.S.C. § 1357(a)(3) (1970). Automobile searches qualify as "border searches" in two instances: (1) when a border crossing has been established and the car is kept under surveillance; and (2) when a border crossing has not been established, but it appears with "reasonable certainty" that the vehicle is carrying suspect goods or persons. *See United States v. Kessler*, 497 F.2d 277, 279 (9th Cir. 1974).

162. Note, *From Bags to Body Cavities: The Law of Border Search*, 74 COLUM. L. REV. 53, 53-54 (1974).

163. *See United States v. Brignoni-Ponce*, 422 U.S. 873, 884 (1975).

164. *Id.* at 884. The suspicion must be founded on "specific articulable facts, together with rational inferences from those facts." *Id.* The standard represents a consideration of the "importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border." *Id.* at 881.

165. 449 U.S. 411 (1981).

166. *Id.* at 421. ("Rather the question is whether, based upon the whole picture, they . . . could reasonably surmise that the particular vehicle they stopped was engaged in criminal activity." *Id.*).

167. *Id.* at 413.

168. *Id.*

In *United States v. Urias*,<sup>178</sup> a border patrol officer, stationed at a checkpoint forty miles north of the Mexican border, observed a pickup-camper turn onto a dirt road leading to a state fish hatchery. From past experience, the officer knew that approximately seventy-five percent of the vehicles turning onto the dirt road carried illegal aliens. Moreover, he was familiar with the employees at the hatchery and would have recognized their vehicles.<sup>179</sup>

The officer drove to the hatchery and stopped beside the camper. Urias was in the driver's seat, and seated next to him were two passengers of Latin appearance. Urias told the officer that he was looking for Holtville. When asked why he did not ask his passengers for directions, Urias responded that he did not know them but had "just picked them up down the road." The passengers did not respond when questioned in English. They did, however, comply with the officer's request in Spanish to leave the car.<sup>180</sup> The passengers told the officer that they had illegally entered the country from Mexico.<sup>181</sup>

On appeal, the Ninth Circuit upheld the warrantless search on the ground that the officer's assessment of the facts, based on his prior experience and knowledge of the area, had led him to conclude properly that illegal activity was taking place.<sup>182</sup>

In *United States v. Perez*,<sup>183</sup> a computer scan of Perez's identification at a border checkpoint revealed that Perez and defendant de la Garza were suspected of smuggling contraband. Although a customs search of Perez yielded nothing, he was placed under continuous surveillance. Perez joined defendant Sanchez and drove 160 miles north of the border. They were followed by defendants Marquez and de la Garza. Two days later, the truck they had been driving was left unattended in a parking lot while the four men drove another car into the desert. There, customs officers approached them with drawn weapons and asked Sanchez if they could search the truck. Sanchez consented. The search revealed four pounds of heroin taped on the inside of the gas tank.<sup>184</sup>

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the vehicle." His fenced compound was not only a residence, but was also a place of business to which the public had been routinely admitted; furthermore, the cages were located a considerable distance away from the residence itself. *Id.* at 994.

178. 648 F.2d 621 (9th Cir. 1981).

179. *Id.* at 622.

180. *Id.* at 623.

181. *Id.*

182. *Id.*

183. 644 F.2d 1299 (9th Cir. 1981).

184. *Id.* at 1301.

lance point and subsequently stopped the only vehicle large enough to carry a group of people which passed that point twice within an hour and a half. Defendant Hernandez-Lorea, riding in the passenger seat, was wearing shoes with a chevron sole. The driver, defendant Cortez, consented to a search of the vehicle, and six aliens were arrested.<sup>169</sup>

On appeal, the Ninth Circuit reversed the defendants' convictions.<sup>170</sup> The court reasoned that there was no basis for stopping the Cortez vehicle because "the circumstances admitted 'far too many innocent inferences to make the officers' suspicions reasonably warranted.'" <sup>171</sup>

The Supreme Court reversed the Ninth Circuit, holding that the stop was justified as an investigative border stop.<sup>172</sup> The Court reasoned that "based upon the whole picture," the officers could "reasonably surmise" that the particular vehicle was being used to smuggle illegal aliens.<sup>173</sup>

In *United States v. Jacobson*,<sup>174</sup> customs agents investigated large scale parrot smuggling from Mexico into the United States. The investigation focused on Jacobson, a pet store owner. On April 20, an informant advised the agents of a sizeable shipment to the United States, and on April 28, the informant advised the agents that he would transport the parrots in his van to Tucson, where he would exchange vehicles with two women. These women were then to make the delivery to Jacobson.<sup>175</sup>

Agents observed the van enter Jacobson's premises and saw flashlights in the area where they had been informed that the birds were kept. Two agents entered and discovered 154 parrots in the cages in which they had presumably been transported.<sup>176</sup>

On appeal, the Ninth Circuit upheld the search as an extended border search because the totality of the surrounding circumstances was sufficient to indicate that the parrots had been smuggled into the United States.<sup>177</sup>

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169. *Id.* at 416.

170. *Id.*

171. *Id.* at 416-17 (citing *United States v. Cortez*, 595 F.2d 505, 508 (1979)). Only the stop was at issue, since the subsequent search was conducted pursuant to Cortez's consent. 449 U.S. at 421.

172. 449 U.S. at 421.

173. *Id.* at 421-22.

174. 647 F.2d 990 (9th Cir.), *cert. denied*, 454 U.S. 897 (1981).

175. *Id.* at 991.

176. *Id.* at 992.

177. *Id.* at 994. In reaching this conclusion, the court found that Jacobson did not possess a sufficiently "reasonable expectation of privacy as to preclude an extended border search of

The Ninth Circuit reversed the district court's ruling upholding the search, reasoning that the search was justified neither as an extended border search nor as a consent search.<sup>185</sup> The court stated that a border search conducted away from the border required "reasonable certainty" that the contraband sought had crossed the border.<sup>186</sup> A ninety-minute gap in the officer's surveillance, however, precluded a determination with "reasonable certainty" that either the truck or the heroin had recently crossed the border.<sup>187</sup>

### 3. Vehicle searches

In *Robbins v. California*,<sup>188</sup> the Supreme Court considered whether the fourth amendment prohibited the warrantless search of two wrapped, opaque packages located in the luggage compartment of the defendant's automobile.<sup>189</sup> Robbins was observed by California Highway Patrol officers driving his station wagon in an erratic manner.<sup>190</sup> The officers subsequently stopped Robbins' vehicle and asked him to produce his driver's license and vehicle registration.<sup>191</sup> When Robbins opened his car door to retrieve the requested items, the officers smelled marijuana smoke.<sup>192</sup> Based on this evidence and a vial of liquid found in Robbins' possession, the officers searched the passenger compartment of his vehicle.<sup>193</sup> The search yielded a quantity of marijuana and related paraphernalia.<sup>194</sup> The officers then opened a recessed luggage compartment and discovered two packages wrapped in green opaque plastic.<sup>195</sup> Each package was sealed with opaque tape and "roughly resemble[d] an oversized, extra-long cigar box with slightly rounded

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185. *Id.* at 1302.

186. *Id.*

187. *Id.*

188. 453 U.S. 420 (1981).

189. Justice Stewart delivered the opinion of the Court in which Justices Brennan, White, and Marshall joined. Chief Justice Burger concurred in the judgment. Justice Powell filed an opinion concurring in the judgment. Justices Blackmun, Rehnquist, and Stevens each filed a dissenting opinion.

190. *Id.* at 422.

191. *Id.*

192. *Id.* Robbins had exited the vehicle after the initial stop. *Id.* It was, therefore, necessary for him to re-enter it in order to procure registration. *Id.*

193. *Id.*

194. *Id.* Robbins was arrested by officers at this time and secured in the patrol car. *Id.* In his dissenting opinion, Justice Rehnquist noted that before the arrest, but after the officers had found the marijuana and related paraphernalia, Robbins stated, "What you are looking for is in the back." *Id.* at 442. (Rehnquist, J., dissenting). This was not mentioned in the plurality opinion.

195. *Id.* at 422.

corners and edges."<sup>196</sup> The officers opened the packages and found fifteen pounds of marijuana.<sup>197</sup>

Following the trial court's denial of Robbins' suppression motion, he was convicted of various drug related offenses.<sup>198</sup> The California Court of Appeal affirmed his conviction on the ground that the contents of the packages could have been inferred from their outward appearance. According to the court, this inference conclusively established that Robbins had no reasonable expectation of privacy with respect to the contents of the packages.<sup>199</sup>

In a plurality opinion, the Supreme Court reversed, ruling that the fourth amendment prohibits the opening of a closed container without a warrant even when it is found during the lawful search of an automobile.<sup>200</sup> In reaching this conclusion, the Court rejected three arguments raised by the Government.<sup>201</sup>

The Government first contended that the disputed search was justifiable under the automobile exception to the fourth amendment warrant requirement.<sup>202</sup> The Court found this argument inconsistent with its holdings in *United States v. Chadwick*<sup>203</sup> and *Arkansas v. Sanders*,<sup>204</sup> and reaffirmed that "a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else."<sup>205</sup>

The Government next contended that the packages in question were not commonly used to transport "personal effects," and, therefore, they were unprotected by the fourth amendment.<sup>206</sup> In rejecting this

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196. *California v. Robbins*, 103 Cal. App. 3d 34, 44, 162 Cal. Rptr. 780, 785 (1st Dist. 1980) (Rattigan, J., dissenting), *quoted in Robbins*, 453 U.S. at 422 n.1.

197. 453 U.S. at 422.

198. *Id.* at 422-23. Robbins' suppression motion concerned only the contraband discovered inside the packages. *Id.* at 423. He made no attempt to suppress the evidence located by officers in the passenger compartment of his vehicle. *Id.*

199. *Id.* at 423. This marked the second time the California Court of Appeal had affirmed the trial court's judgment. The initial affirmance was vacated by the Supreme Court, 443 U.S. 903 (1979), and the case was remanded for further consideration in light of *Arkansas v. Sanders*, 442 U.S. 753 (1979).

200. 453 U.S. at 428.

201. The Government did not argue that the search was conducted incident to a lawful arrest. *Id.* at 429 n.3. *Cf.* *New York v. Belton*, 453 U.S. 454 (1981) (permissible scope of search incident to arrest includes entire passenger compartment and all contents therein).

202. 453 U.S. at 425.

203. 433 U.S. 1 (1977).

204. 442 U.S. 752 (1979).

205. 453 U.S. at 424-25.

206. *Id.* at 425. The Government argued that the term "personal effects" meant "property worn on or carried about the person or having some intimate relation to the person." *Id.*

contention, the Court reasoned that fourth amendment protections extend to all of the belongings of an individual, whether personal or impersonal.<sup>207</sup> Therefore, once a person's belongings are placed inside a closed container, the owner has manifested a reasonable expectation of privacy in that container.<sup>208</sup> The Court further noted the virtual impossibility of formulating objective standards to determine whether a container is normally used to transport "personal effects."<sup>209</sup>

Relying on dicta in *Sanders*, the Government finally argued that because the contents of the packages could be inferred from their outward appearance, Robbins had no reasonable expectation of privacy with respect to those contents.<sup>210</sup> The Court, however, characterized the exception noted in *Sanders* as an extension of the plain view exception.<sup>211</sup> The Court specified that the plain view exception would be operative only where "a container . . . so clearly announce[s] its contents, whether by its distinctive configuration, its transparency, or otherwise, that [they] are obvious to an observer."<sup>212</sup> Because the record did not adequately establish that the packages in Robbins' car could only have contained marijuana, the Court concluded that the ex-

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207. *Id.* at 426.

208. *Id.* In the words of the Court, "[o]nce placed within such a container a diary and a dishpan are equally protected by the Fourth Amendment." *Id.*

209. *Id.* at 427. Although Justice Stevens dissented on the ground that the automobile exception should be extended to all containers found in the subject car, he agreed that drawing distinctions between containers was unwise. *Id.* at 447 (Stevens, J., dissenting). See also 442 U.S. at 772 (Blackmun, J., dissenting) (fourth amendment does not distinguish between "an orange crate, a lunch bucket, an attache case, a duffle bag, a cardboard box, a backpack, a totebag, and a paperbag.").

210. 453 U.S. at 427 (citing *Sanders*, 442 U.S. at 764 n.13 ("Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment.")).

211. 453 U.S. at 427 (citing *Sanders*, 442 U.S. at 764-65 n.13 ("[S]ome containers (for example, a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance.")).

212. 453 U.S. at 428. In his dissenting opinion Justice Blackmun persuasively alleged that "only time will tell whether the [plurality's] 'test' . . . for determining whether a package's exterior 'announces its contents' will lead to a new stream of litigation." *Id.* at 436 (Blackmun, J., dissenting). Under the plurality's test, it was still possible to conclude that Robbins' packages announced the presence of marijuana inside. The test significantly weakens an otherwise strong mandate by the Court. The better course would have been to limit the *Sanders* exception to open and/or transparent containers from which the contents are plainly and clearly visible. The Court's assumption that certain containers necessarily announce their contents is a faulty one. Just as a violin case may house any number or type of items, a burglar tool kit does not necessarily mandate the presence of burglar tools. Thus, the *Sanders* exception should not be extended to any items other than those actually in plain view.

ception was not applicable.<sup>213</sup>

Justice Powell, in his concurring opinion, expressed the view that container cases should be decided individually, based on the owner's expectation of privacy.<sup>214</sup> Justice Powell reasoned that Robbins had manifested such an expectation by the manner in which he had wrapped the packages.<sup>215</sup> Justice Powell suggested that:

[w]hen confronted with the claim that police should have obtained a warrant before searching an ambiguous container, a court should conduct a hearing to determine whether the defendant had manifested a reasonable expectation of privacy in the contents of the container.<sup>216</sup>

Such a hearing would occur *after* the alleged police violation and would include an examination of the type of container and whether it appeared from the character of the container that its owner intended to keep its contents private.<sup>217</sup> Furthermore, Justice Powell noted that "[a] prudent officer will err on the side of respecting ambiguous assertions of privacy . . . and a realistic court seldom should second-guess the good-faith judgment of the officer in the field when the public consequently must suffer from the suppression of probative evidence."<sup>218</sup>

In a dissenting opinion, Justice Rehnquist stated that *Robbins* should have been decided within the ambit of the automobile exception.<sup>219</sup> He noted that *Chadwick* and *Sanders* "attempted to limit" the

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213. *Id.* The record contained a single statement made by one of the arresting officers to the effect that he had heard that contraband was packaged in a manner similar to that used to package the items found in Robbins' automobile. *Id.*

214. *Id.* at 429 (Powell, J., concurring). Powell felt that the plurality opinion would effectively "extend the Warrant Clause of the Fourth Amendment to every 'closed, opaque container,' without regard to size, shape, or whether *common experience* would suggest that the owner was asserting a privacy interest in the contents." *Id.* at 429 n.1 (emphasis added). He expressed the concern that such a mechanical requirement "would impose . . . a substantial new burden on law enforcement." *Id.* at 443.

Justice Powell failed to recognize that the goal of the fourth amendment is not efficiency. Its purpose is to protect citizens from unrestricted and arbitrary government behavior. Thus, the fourth amendment has always imposed a substantial burden on law enforcement. Powell's argument, therefore, takes issue not only with the plurality's rule but with the amendment itself.

215. *Id.* at 429.

216. *Id.* at 434 n.3. Powell, therefore, apparently advocates removing the burden from the police and placing it on an already over-burdened court system.

217. *Id.*

218. *Id.* (citations omitted). This hearing then, would not only be costly but would be substantially meaningless as it would favor the unrestricted discretion of the police.

219. *Id.* at 439 (Rehnquist, J., dissenting). Justice Rehnquist also advocated abolishment of the exclusionary rule and asserted that the fourth amendment does not require searches to

scope of that exception<sup>220</sup> but asserted that if an automobile is subject to a warrantless search, any personal property found within the automobile may also be searched.<sup>221</sup>

In a separate dissent, Justice Stevens similarly advocated application of the automobile exception.<sup>222</sup> He specified, however, that the exception would only be applicable when probable cause or some other exigency justified a search of the entire automobile.<sup>223</sup> Justice Stevens noted that in *Sanders*, probable cause to search was focused on the luggage in question rather than on the automobile itself; consequently, those items were accorded constitutional protection.<sup>224</sup> Conversely, because the officers in *Robbins* had probable cause to search the entire automobile, Justice Stevens reasoned that the permissible scope of the search included all containers found therein.<sup>225</sup>

*New York v. Belton*<sup>226</sup> involved a factual situation substantially similar to that presented in *Robbins*. In *Belton*, however, the Court chose to uphold the challenged search as "incident to a lawful custodial arrest."<sup>227</sup>

In *Belton*, a New York state police officer stopped a speeding vehicle occupied by defendant Belton and three other individuals. As he approached the vehicle, the officer smelled marijuana and observed an envelope with the inscription "Supergold" on the floor.<sup>228</sup> He immediately ordered the occupants out of the vehicle and arrested them for possession of marijuana. After determining that the envelope did, in fact, contain marijuana, the officer searched the entire passenger com-

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be conducted pursuant to warrants. His view is that it merely mandates that they be reasonable. *Id.* at 437-39.

220. *Id.* at 442-43.

221. *Id.* at 443. Justice Rehnquist argued in the alternative that the packages discovered in *Robbins*' vehicle clearly fell within the exception noted in *Sanders*. *Id.* at 441-42. See *supra* notes 210-11.

222. 453 U.S. at 444 (Stevens, J., dissenting).

223. *Id.* at 449 n.9.

224. *Id.*

225. *Id.* at 444. Justice Stevens' argument ignores the plurality's postulate that containers may easily be brought under the control of the police and held until a warrant is obtained. See *id.* at 424.

226. 453 U.S. 454 (1981).

227. *Id.* at 462-63. Stewart, J., delivered the opinion of the Court, in which Burger, C.J., Blackmun, J., Powell, J., and Rehnquist, J., joined. Rehnquist, J., filed a concurring statement; Stevens, J., filed a statement concurring in the judgment; Brennan, J., and White, J., filed dissenting opinions, in which Marshall, J., joined. *Id.* at 454-55.

Although the search took place within an automobile, the Court specifically declined to consider the applicability of the automobile exception. See *id.* at 462 n.6.

228. *Id.* at 456-57. The officer associated the inscription with marijuana and apparently believed that the envelope contained that substance. *Id.* at 457.



partment of the vehicle. During this search, he picked up Belton's jacket, unzipped one of the pockets, and discovered cocaine.<sup>229</sup>

The trial court denied Belton's motion to suppress the cocaine, and he pled guilty to a lesser offense.<sup>230</sup> The Appellate Division of the New York Supreme Court upheld the search, stating that after Belton's arrest the officer justifiably examined the immediate area for more contraband.<sup>231</sup> The New York Court of Appeals reversed, holding that the search incident to arrest exception was inapplicable because Belton could not have gained access to the areas searched.<sup>232</sup>

The search incident to arrest exception to the fourth amendment warrant requirement was most recently considered by the Supreme Court in *Chimel v. California*.<sup>233</sup> In that case, officers arrested the defendant in his home and then conducted a warrantless search of his house, attic, and garage. The *Chimel* Court held the search invalid on

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229. *Id.* at 456.

230. *Id.* Belton, however, preserved his claim that the cocaine had been seized in violation of the fourth amendment. *Id.*

231. *Id.*

232. *Id.* Two dissenting judges of the New York Court of Appeals observed that because there were four arrestees and only one police officer, the passenger compartment of the car was dangerously within reach of the suspects. *Id.* at 456-57.

233. 395 U.S. 752 (1969). The scope of the search incident to arrest doctrine has periodically fluctuated. In *Weeks v. United States*, 232 U.S. 383 (1914), the Court recognized "the right on the part of the Government . . . to search *the person* of the accused when legally arrested to discover and seize the fruits or evidences of crime." *Id.* at 392 (emphasis added). In *Carroll v. United States*, 267 U.S. 132 (1925), the Court expanded the exception to include evidence found on the arrestee *or in his control*. *Id.* at 158. Citing *Weeks* and *Carroll*, the Court in *Agnello v. United States*, 269 U.S. 20 (1925), noted in dictum that searches incident to arrest could be made of the arrestee and *the place* where the arrest was made. *Id.* at 30. This dictum later formed the basis for the Court's decision in *Marron v. United States*, 275 U.S. 192 (1927), that the seizure of a ledger was lawful because the arrest gave agents the right to "contemporaneously . . . search *the place* in order to find and seize the things used to carry on the criminal enterprise." *Id.* at 199 (emphasis added). See also *Harris v. United States*, 331 U.S. 145, 151 (1947) (search incident to arrest may also include premises under arrestee's immediate control).

In *Trupiano v. United States*, 334 U.S. 699 (1948), the Court, stating that a warrantless search incident to arrest constituted a "limited right," held the seizure of an illegal still unlawful. *Id.* at 708. See also *McDonald v. United States*, 335 U.S. 451 (1948). In *United States v. Rabinowitz*, 339 U.S. 56 (1950), however, the Court rejected the reasoning in *Trupiano*, and held that an area in the possession or under the control of the arrestee may be searched without a warrant after a lawful arrest. *Id.* at 66. Until the *Chimel* decision, *Rabinowitz* was considered to be controlling where the search incident to arrest exception was concerned. See, e.g., *Ker v. California*, 374 U.S. 23, 41 (1963) (search of house incident to a lawful arrest upheld); *Abel v. United States*, 362 U.S. 217, 237 (1960) (search of a defendant's room pursuant to lawful administrative arrest upheld); *Draper v. United States*, 358 U.S. 307, 311 (1959); *Jones v. United States*, 357 U.S. 493, 500 (1958); *Kremen v. United States*, 353 U.S. 346 (1957).

the ground that it was too extensive.<sup>234</sup> The Court emphasized that a warrantless search incident to a lawful arrest is permissible, but its scope may not exceed the area within the arrestee's immediate control, and it may only be undertaken to prevent the arrestee from procuring a weapon or his destruction or concealment of evidence.<sup>235</sup>

The *Belton* Court restated and reviewed these principles,<sup>236</sup> but noted that lower courts had had difficulty applying them.<sup>237</sup> The Court specifically observed that no workable definition of the term "area within the immediate control of the arrestee" had been formulated when that area "arguably includes the interior of an automobile and the arrestee is its recent occupant."<sup>238</sup> Such a definition was necessary, according to the Court, because law enforcement demands quick decisions and therefore requires a "bright line" rule which is easily applicable in the field.<sup>239</sup>

In an effort to formulate a workable definition, the *Belton* Court then held that once the occupant of an automobile has been lawfully arrested, it is permissible for police officers to search the passenger compartment as well as *any* open or closed containers<sup>240</sup> located therein.<sup>241</sup> These areas, the Court reasoned, were "generally, even if

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234. 395 U.S. at 762-63.

235. *Id.* at 763.

236. 453 U.S. at 457-58.

237. *Id.* at 458.

238. *Id.* at 460. *See, e.g.*, *United States v. Benson*, 631 F.2d 1336 (8th Cir. 1980); *United States v. Sanders*, 631 F.2d 1309 (8th Cir. 1980); *United States v. Rigales*, 630 F.2d 364 (5th Cir. 1980); *United States v. Dixon*, 558 F.2d 919 (9th Cir. 1977); *United States v. Frick*, 490 F.2d 666 (5th Cir. 1973).

239. 453 U.S. at 458. The purpose of the exclusionary rule is to deter illegal police conduct. If an ambiguous legal standard results in police uncertainty regarding the permissibility of police conduct, the purpose of the exclusionary rule is obfuscated. It does not necessarily follow, however, as the Court concluded in *Belton*, that enlargement of such a standard is the most effective means of resolving its ambiguities. Neither is such an enlargement justified merely because a "bright line" rule would be more convenient. *See Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (mere fact that enforcement may be more efficient can never, by itself, justify disregard of the fourth amendment warrant requirement).

240. 453 U.S. at 460. Containers were defined as "any object[s] capable of holding . . . other object[s]." *Id.* at 460 n.4. This includes "closed or open glove compartments, consoles, or other receptacles . . . as well as luggage, boxes, bags, clothing, and the like." *Id.* Not included, however, were the trunk and items located within it. *Id.*

241. Subsequent application of this standard to the facts presented resulted in an affirmation of defendant's conviction and a reversal of the New York Court of Appeals' ruling. 453 U.S. at 463. In the final portion of its opinion, the Court criticized the state court for relying on *United States v. Chadwick*, 433 U.S. 1 (1977) and *Arkansas v. Sanders*, 442 U.S. 753 (1979). The Court noted that *Chadwick* and the principles enunciated therein were inapplicable because the search incident to arrest exception was not at issue. 453 U.S. at 461-62.

not inevitably" within reach of an arrestee.<sup>242</sup> Relying on *United States v. Robinson*,<sup>243</sup> the Court also specified that a lawful arrest in and of itself justified a broad scope of search. It is thus not necessary to demonstrate that evidence may be destroyed or concealed, or that the safety of an arresting officer is endangered.<sup>244</sup>

Justice Stevens concurred in the upholding of *Belton*'s conviction, but would have done so on the basis of the automobile exception.<sup>245</sup> The Court's expansion of the search incident to arrest exception was, in his opinion, both unnecessary and dangerous. Such an expansion would enable police officers to arrest individuals for minor traffic violations, and on that basis alone permit them, unreasonably, to search the interior of their automobile and any containers in the automobile.<sup>246</sup> According to Stevens, this created a situation where an officer's decision would "provide the constitutional predicate for broader vehicle searches than any neutral magistrate could authorize by issuing a warrant."<sup>247</sup>

Justice Brennan, in dissent, stressed that the *Chimel* Court had placed both "temporal and . . . spatial limitations" on the search incident to arrest exception.<sup>248</sup> Specifically, he noted that *Chimel* was "narrowly tailored" to situations where, immediately following a custodial arrest, a threat to the officer's safety or the destruction of evidence

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242. 453 U.S. at 460. The fact that the individuals were separated on the highway after being arrested amply demonstrates that this is not true.

243. 414 U.S. 218 (1973). In *Robinson*, the Court upheld the warrantless search of a crumpled cigarette package as incident to a lawful arrest. According to the Court:

The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.

*Id.* at 235.

244. 453 U.S. at 459. The position taken by the *Belton* Court is plainly inconsistent with the holding in *Chimel*. See *Chimel v. California*, 395 U.S. 752, 763 (1969). If a search incident to a lawful arrest is always reasonable, regardless of the presence of the justifications supporting the exception, the exception has no purpose other than to allow police officers to avoid the warrant requirement. Although the *Belton* Court did not directly reject the justifications for the exception, see 453 U.S. at 460 n.3, they have been, for all practical purposes, rendered meaningless.

245. See 453 U.S. at 463 (Stevens, J., concurring) (citing *Robbins v. California*, 453 U.S. 420, 444 (1981) (Stevens, J., dissenting)).

246. *Id.* at 452.

247. *Id.*

248. 453 U.S. at 465 (Brennan, J., dissenting).

was imminent.<sup>249</sup> Brennan concluded that the majority had abandoned the *Chimel* principles in favor of an arbitrary "bright line" rule.<sup>250</sup> Such a rule, in Brennan's view, could "provide a workable guide in certain routine cases," but would ultimately "create more problems than it solved."<sup>251</sup>

### E. Warrantless Arrests

An investigatory stop is considered constitutionally permissible if articulable facts give rise to a reasonable suspicion of the presence of criminal activity. However, the more severe intrusion of an arrest is considered legal only if based on probable cause.<sup>252</sup> As a general rule, arrest warrants are not constitutionally required for an arrest, even when the police have sufficient time to procure a warrant without jeopardizing the arrest.<sup>253</sup> Such a warrant is, however, constitutionally required to effect an arrest in a private home, absent exigent circumstances.<sup>254</sup>

In *Michigan v. Summers*,<sup>255</sup> the United States Supreme Court recently decided that a warrant to search for contraband "implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."<sup>256</sup> In *Summers*, the police were about to search a house for drugs pursuant to a warrant when they met the defendant descending the front steps. The police asked Summers to let them into the house. They detained Summers while conducting the search, and ultimately, the police found drugs in the house. After learning that Summers was the owner of the house, the police arrested him, searched him, and discovered heroin in his coat pocket.<sup>257</sup>

Summers argued that the heroin should have been suppressed because it had been obtained during an illegal detention. The Court,

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249. *Id.*

250. *Id.* at 463.

251. *Id.* at 469. Justice Brennan noted, for example, that the majority's "bright line" rule left the following questions unanswered: How long after the suspect has been arrested may the search be conducted? How close to the car must the arrestee be in order to render the search permissible? May probable cause to search the car be found after the arrest? Finally, does the "interior" of the car include door panels or floorboards? *Id.* at 470.

252. *Dunaway v. New York*, 442 U.S. 200, 212-13 (1979) (careful analysis of the distinctions between those circumstances which constitute an arrest requiring probable cause and those which constitute an investigatory stop requiring mere reasonable suspicion).

253. *See United States v. Watson*, 423 U.S. 411, 423-24 (1976).

254. *Payton v. New York*, 445 U.S. 573, 590 (1980).

255. 452 U.S. 692 (1981).

256. *Id.* at 705.

257. *Id.* at 693.

however, held that the search was legal because the police had authority to detain Summers until evidence establishing probable cause to arrest him was found. Once this occurred, Summers' arrest and search incident to the arrest were constitutional.<sup>258</sup>

Several factors supported the Court's finding that the initial detention was legal. First, the police had obtained a warrant to search Summers' house for drugs.<sup>259</sup> Because a neutral magistrate had decided that there was probable cause to believe contraband was in the house and had authorized a substantial intrusion into the privacy of the persons living there, the detention of the owner was "surely less intrusive than the search itself."<sup>260</sup> Moreover, the Court decided that the type of detention imposed was unlikely to be exploited to gain more information, since the information sought would normally be obtained through searching the house rather than through the detention.<sup>261</sup> The Court also reasoned that the search warrant provided an objective justification for the detention. Because a judicial officer had determined that there was probable cause to believe that *someone* in the house was committing a crime, an occupant's connection with that house gave the police an identifiable and articulable basis for believing that the "suspicion of criminal activity justified a detention of that occupant."<sup>262</sup>

The dissenting opinion pointed out that this holding turned the requirement of probable cause for arrest "upside down."<sup>263</sup> The dissent argued that the majority used *exceptions* to the general rule of a warrant requirement based on *special circumstances* to create a new, expanded rule applicable to the unrelated situation of *normal police activities*. The legitimate law enforcement purposes which underlie the need for those exceptions to the warrant requirement are not present when ordinary police activities are conducted.<sup>264</sup> Moreover, the dissent contended that the exceptions to the warrant requirement allow *limited intrusions* into personal privacy, whereas here the intrusion of an arrest was far from a *limited* one.<sup>265</sup> The dissent also criticized the majority's rule as lacking inherent limitations. Because a proper search under the

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258. *Id.* at 705.

259. *Id.* at 701.

260. *Id.*

261. *Id.*

262. *Id.* at 703-04.

263. *Id.* at 709 (Stewart, J., dissenting).

264. *Id.*

265. *Id.* at 710.

majority rule "can mean a detention of several hours,"<sup>266</sup> the police can make a person "a prisoner in his own home for a potentially very long period of time."<sup>267</sup>

The Ninth Circuit recently addressed the question of when an investigatory stop escalates into an arrest in *United States v. Harrington*.<sup>268</sup> Defendant Harrington had been under surveillance by border patrol agents for several days during his stay in Douglas, Arizona, an area known for the smuggling of illegal aliens. Harrington was registered at a motel under an assumed name, and agents had observed a Mexican male visiting his room three times for brief periods. After the last visit, Harrington took a circuitous route to two known alien pick-up areas. After his stops at these areas, Harrington's van appeared to be riding low, swaying on curves, bouncing at dips, and struggling to climb hills.<sup>269</sup> Harrington was stopped by a police officer ostensibly for a traffic violation. A border patrol agent approached the suspect, identified himself, and stated: "[d]epending on what I find [when checking the van] I need to come back and talk to you about an immigration violation." Seventeen illegal aliens were found in the van.<sup>270</sup>

On appeal, Harrington alleged that he had been arrested, rather than merely stopped, when the border patrol agent informed him that he was going to be questioned about an immigration violation. The court stated that whether an investigatory stop escalates into an arrest "depends on all of the surrounding circumstances including the extent that freedom of movement is curtailed and the degree and type of force or authority used to effectuate the stop."<sup>271</sup> The court concluded that in this instance nothing would lead a reasonable person to believe that Harrington had been arrested.<sup>272</sup> The court also found that the facts of the case gave rise to reasonable suspicion justifying the investigatory stop.<sup>273</sup> The court's conclusion is well within the factual parameters of other cases where police actions have been found to constitute investigatory stops.<sup>274</sup>

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266. *Id.* at 711.

267. *Id.*

268. 636 F.2d 1182 (9th Cir. 1980).

269. *Id.* at 1184.

270. *Id.* at 1186.

271. *Id.* (citing *United States v. Beck*, 598 F.2d 497, 500-02 (9th Cir. 1979) (arrest rather than investigatory stop occurred when nine armed officers in four vehicles surrounded defendants' taxi and two agents took each defendant by the arms to different locations around the car)).

272. 636 F.2d at 1186.

273. *Id.*

274. *See, e.g., Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *Terry v. Ohio*, 392 U.S. 1

In *United States v. Patterson*,<sup>275</sup> the Ninth Circuit again held that a defendant had not been arrested. Defendant Oglesby had parked in front of a residence being searched by DEA agents and had remained in his car with the motor running while his passenger went inside. DEA agents then blocked the car and ordered Oglesby out of the car. As he emerged, Oglesby told the agents that there was a gun under the front seat. The agents asked whether there was anything else in the car, and Oglesby responded that there was marijuana and cocaine.<sup>276</sup>

On appeal, Oglesby contended that he had been arrested rather than stopped when the agents had blocked his car and ordered him out, and that the arrest was made without probable cause.<sup>277</sup> He also contended that even if he had not been arrested, the agents lacked reasonable suspicion for an investigatory stop.<sup>278</sup>

The Ninth Circuit relied on the *Harrington* test and found that the stop was not an arrest. The court stated that a valid stop is not transformed into an arrest because agents momentarily restrict a person's freedom, provided that excessive force is not used. The court concluded that a different rule would prevent agents from performing their investigative functions without a suspect's cooperation.<sup>279</sup> In this case, the court decided that blocking the defendant's car "was a reasonable precaution" to ensure that he would not drive away before the agents could question him. Ordering him from his car was also regarded as a reasonable precaution.<sup>280</sup> Thus, the court found that the force used by the agents was not excessive and that an "innocent person could not reasonably have assumed he was being taken into custody indefinitely."<sup>281</sup>

In *United States v. Patino*,<sup>282</sup> the Ninth Circuit considered whether DEA agents had arrested Patino when they stopped and questioned her

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(1968). In *Terry*, an officer approached suspects who appeared to be casing a store, identified himself as a policeman, and asked them to identify themselves. When the suspects only mumbled something in return, the officer grabbed Terry and patted him down. This was held to be an investigatory stop. 392 U.S. at 19.

In *Mimms*, officers stopped a vehicle to issue a traffic citation, ordering the driver out of the car. When the officer noticed a bulge in the defendant's pocket, he frisked the defendant. This was held to be an investigatory stop. 434 U.S. at 109.

275. 648 F.2d 625 (9th Cir. 1981).

276. *Id.* at 628.

277. *Id.* at 631.

278. *Id.*

279. *Id.* at 633.

280. *Id.*

281. *Id.* at 634.

282. 649 F.2d 724 (9th Cir. 1981).

at the Miami Airport. Patino was stopped and required to produce her airline ticket and identification. The agents informed her early in the conversation that she fit the DEA's profile of a female drug courier. She was not, however, told that she could refuse to stop as well as refuse to answer the agents' questions.<sup>283</sup>

Patino argued that she was stopped without reasonable suspicion that she had engaged in unlawful activity. She contended that because the stop was illegal, the drugs found in her suitcase as a result of information derived from the stop should have been suppressed.<sup>284</sup>

The Ninth Circuit found that Patino's encounter with the agents had constituted an arrest within the meaning of the fourth amendment. The court's decision rested on the following facts: (1) Patino was an alien with a language problem;<sup>285</sup> (2) when the agents stopped her, Patino was not told that she could refuse to stop and answer questions; and (3) Patino was an alien and therefore she may have felt a greater compulsion to comply with the agents' requests and "would not reasonably have believed she was free to walk away" when they stopped her.<sup>286</sup> For these reasons, the Ninth Circuit upheld the trial court's order suppressing evidence obtained after the stop.<sup>287</sup>

#### *F. Joint Ventures*

The fourth amendment does not generally apply to searches or seizures made by foreign officials while enforcing foreign law, even if the evidence is seized from American citizens.<sup>288</sup> Under the doctrine of joint venture, however, the fourth amendment is deemed applicable when American officials so actively participate in the search or seizure that the foreign officials, in fact, become their agents.<sup>289</sup> The practical

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283. *Id.* at 726.

284. *Id.* at 725.

285. Patino had requested that a Spanish-speaking officer be present during interrogation. *Id.* at 726.

286. *Id.* at 727. The court stated that whether a seizure comes within the protection of the fourth amendment depends on "whether the person stopped reasonably believed that he or she was not free to leave." *Id.* at 726-27 (citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1960)).

287. 649 F.2d at 729.

288. *United States v. Rose*, 570 F.2d 1358, 1361-62 (9th Cir. 1978) (joint venture doctrine inapplicable to search of suitcase by Canadian customs officer because American customs officials neither ordered, directed, nor participated in search).

289. *Id.* at 1362 (citing *Stonehill v. United States*, 405 F.2d 738, 743 (9th Cir. 1968) (joint venture doctrine applicable only if federal agents "so substantially participated in the raids so as to convert them into joint ventures between the United States and the foreign officials"), *cert. denied*, 395 U.S. 960 (1969)).



difficulty of establishing the existence of a joint venture<sup>290</sup> is illustrated by two recent Ninth Circuit opinions.

In *United States v. Maher*,<sup>291</sup> the defendant was convicted of conspiracy and possession of marijuana with the intent to distribute the drug. On appeal, Maher claimed that an unlawful wiretap was used by Canadian police to acquire information which was later given to DEA agents.<sup>292</sup> This information was incorporated into an affidavit used by the DEA to obtain a search warrant. Maher claimed that the joint venture doctrine applied and tainted the fruits of the DEA search. The court held, however, that the absence of any use by the DEA of Canadian police as "agents" was a sufficient ground for rejection of the joint venture claim.<sup>293</sup>

The Ninth Circuit also rejected a joint venture claim in *United States v. Benedict*,<sup>294</sup> where a Bangkok customs official discovered heroin concealed in radio sets that Benedict was shipping to America. Both the Thai police and the Bangkok office of the DEA were notified. A subsequent search of Benedict's apartment by Thai police, in which American officials were invited to join, yielded more heroin and led to Benedict's arrest.

The court rejected the joint venture theory because the Thai police initiated their own search after discovering the heroin at the customs station. Furthermore, the search warrant had been issued by the Bangkok police and DEA agents were invited to participate in the search only because the heroin had been marked for shipment to the United States.<sup>295</sup>

Both the above decisions appear consistent with other opinions in the joint venture area. The key factors are whether foreign or United States officials initiated the allegedly unconstitutional actions involved and the degree of American participation in these actions.<sup>296</sup>

Although the present judicial trend appears to favor rejection of

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290. See *United States v. Morrow*, 537 F.2d 120 (5th Cir. 1976), *cert. denied*, 430 U.S. 956 (1977). "[A]s a statistical matter [the courts have] been virtually unanimous in rejecting claims of undue participation." *Id.* at 140.

291. 645 F.2d 780 (9th Cir. 1981) (per curiam).

292. *Id.* at 781-82.

293. *Id.* at 783.

294. 647 F.2d 928 (9th Cir.), *cert. denied*, 454 U.S. 1087 (1981).

295. *Id.* at 930-31.

296. See, e.g., *Pfeifer v. United States Bureau of Prisons*, 615 F.2d 873, 877 (9th Cir.), *cert. denied*, 447 U.S. 908 (1980); *United States v. Rose*, 570 F.2d 1358, 1362 (9th Cir. 1978); *United States v. Morrow*, 537 F.2d 120, 139 (5th Cir. 1976); *United States v. Johnson*, 451 F.2d 1321, 1322 (4th Cir.), *cert. denied*, 405 U.S. 1018 (1971); *United States v. Tierney*, 448 F.2d 37, 39 (9th Cir. 1971); *United States v. Shea*, 436 F.2d 740, 741 (9th Cir. 1970), *appeal*

joint venture claims,<sup>297</sup> the doctrine may still apply if American officials either actively participate in the search or arrest or initiate the action on their own accord and then participate in its execution.<sup>298</sup>

### G. *The Retroactivity of Chadwick*

The constitutional doctrine announced by the Supreme Court in *United States v. Chadwick*<sup>299</sup> has generated several cases raising the issue of whether *Chadwick* should be applied retroactively. *Chadwick* held that, absent exigent circumstances, police must obtain a warrant before searching luggage lawfully seized from an automobile.<sup>300</sup> The Court reasoned that luggage is a common receptacle for personal effects, and, therefore, is inevitably associated with a legitimate expectation of privacy.<sup>301</sup>

The Ninth Circuit's position that *Chadwick* should *not* be applied retroactively was reaffirmed in *United States v. Stewart*.<sup>302</sup> In *Stewart*, the police conducted a warrantless search of an attache case found on the rear seat of Stewart's vehicle and discovered that it contained methamphetamine. Stewart argued that under the Supreme Court's decision in *Arkansas v. Sanders*,<sup>303</sup> the *Chadwick* doctrine should be applied retroactively, and, therefore, the methamphetamine should have been suppressed.<sup>304</sup> The Ninth Circuit, however, determined that

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*after remand*, 445 F.2d 856 (1971); *Stonehill v. United States*, 405 F.2d 738, 743, 746 (9th Cir. 1968).

297. See *supra* note 290 and accompanying text.

298. See, e.g., *United States v. Emery*, 591 F.2d 1266, 1268 (9th Cir. 1978) (joint venture established when DEA agents alerted Mexican police to possible drug transaction in Guaymas area, coordinated surveillance of suspects at Guaymas airport, supplied DEA undercover agent to act as pilot in drug transaction, and gave signal instigating defendant's arrest); *United States v. Pechac*, 54 F.R.D. 187, 189 (D. Ariz. 1972) (joint venture established when federal investigator actively participated in searching defendant's home with local Phoenix police, checked discovered weapons against defendant's registration papers, and took custody of weapons after listing them on local authorities' inventory of seized property).

299. 433 U.S. 1 (1977).

300. *Id.* at 15-16.

301. *Id.* at 13.

302. 650 F.2d 178, 179 (9th Cir. 1981). See *United States v. Cornejo*, 598 F.2d 554, 556 (9th Cir. 1979) (*Chadwick* only to be applied prospectively).

303. 442 U.S. 753 (1979). In *Sanders*, police had probable cause to believe that the defendant's suitcase contained marijuana. They followed the defendant's taxi, stopped the vehicle, and, without consent or a warrant, searched the suitcase, in which the contraband was discovered. The Court applied *Chadwick* and held that the evidence should have been suppressed at trial because the police did not obtain a warrant before instituting the search. *Id.* at 757-66.

304. 650 F.2d at 179.

although the *Sanders* Court applied *Chadwick* to a pre-*Chadwick* search and held that the evidence seized during the warrantless search was inadmissible, it did not specifically address the issue of *Chadwick's* retroactivity.<sup>305</sup> It was therefore improper to infer that the Court intended to apply *Chadwick* retroactively.<sup>306</sup>

The court also applied the retroactivity guidelines established by the Supreme Court in *United States v. Peltier*.<sup>307</sup> In *Peltier*, the Court "expressed a strong preference" for applying new decisions prospectively when the exclusionary rule is involved.<sup>308</sup> Its rationale for this preference was that the policies of deterrence and judicial integrity underlying the exclusionary rule were not served when the police believed in good faith that their actions were lawful under current constitutional standards.<sup>309</sup>

The *Stewart* court ruled that *Chadwick* indeed changed contemporary constitutional standards.<sup>310</sup> *Sanders* neither contradicted this ruling nor overruled or distinguished *Peltier*.<sup>311</sup> Thus, because the police in *Stewart* searched the attache case in a good faith belief that their actions were lawful under contemporary constitutional standards, precedential authority clearly favored prospective application of *Chadwick*.<sup>312</sup>

The Ninth Circuit's opinion in *Stewart* is consistent with the law in several other circuits. Because the Supreme Court has not explicitly decided the question of *Chadwick's* retroactivity, other circuits faced with this question have also looked to *Peltier* for guidance. Most have interpreted *Peltier* as indicating that *Chadwick* should be applied prospectively.<sup>313</sup> The Eighth Circuit, however, has taken a different approach to this issue, holding that because *Chadwick* announced no new constitutional standard, it *may* be applied retroactively.<sup>314</sup> The ap-

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305. The Court explicitly stated that it granted certiorari in *Sanders* "to resolve some apparent misunderstanding as to the application of our decision in *United States v. Chadwick*." 442 U.S. at 754 (citation and footnotes omitted).

306. 650 F.2d at 179-80.

307. 422 U.S. 531 (1975).

308. *Id.* at 535.

309. 650 F.2d at 180 (citing *United States v. Peltier*, 442 U.S. at 538).

310. 650 F.2d at 180-81.

311. *Id.* at 180.

312. *Id.*

313. *See, e.g.*, *United States v. Berry*, 571 F.2d 2, 3 (7th Cir.), *cert. denied*, 439 U.S. 840 (1978); *United States v. Reda*, 563 F.2d 510, 511-12 (2d Cir. 1977) (*per curiam*), *cert. denied*, 435 U.S. 973 (1978); *United States v. Montgomery*, 558 F.2d 311, 312 (5th Cir. 1977) (*per curiam*).

314. *See, e.g.*, *United States v. Schleis*, 582 F.2d 1166, 1174 (8th Cir. 1978) ("Unlike *Peltier*, this case does not present a question of retroactivity and, thus, we need not reach the

proach of those circuits, including the Ninth Circuit, that have held that *Chadwick* is to be applied *prospectively*, however, appears to be more consistent with the Supreme Court's general approach to the retroactivity of decisions involving the exclusionary rule.

## II. PROCEDURAL RIGHTS OF THE ACCUSED

### A. *The Right Against Self-Incrimination*

Since 1791, the fifth amendment to the United States Constitution has guaranteed to United States citizens the right against self-incrimination in a criminal proceeding.<sup>315</sup> One hundred and seventy-three years later in *Malloy v. Hogan*<sup>316</sup> this fundamental protection was made applicable to the states. Recently, issues involving the right against self-incrimination have been raised before both the Supreme Court and the Ninth Circuit.

#### 1. *Miranda* challenges

##### a. *Miranda* rights at psychiatric evaluations

In *Estelle v. Smith*,<sup>317</sup> the Supreme Court addressed whether an accused must be advised of his or her right against self-incrimination before submitting to a court-ordered psychiatric examination, when the examination's conclusions may be used to determine the defendant's sentence.<sup>318</sup> Defendant Smith was indicted for murder.<sup>319</sup> In response to the state's announcement that it would seek the death penalty for Smith, the trial judge ordered a psychiatric examination to determine Smith's competence to stand trial.<sup>320</sup> After a ninety-minute examination, Dr. Grigson, the court-appointed psychiatrist, concluded that although the defendant was "a severe sociopath," he was competent to

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question of whether or not to apply the exclusionary rule. . . . *Chadwick* announces no new constitutional doctrine, nor does it broaden any existing exclusionary rule. All the Court did in *Chadwick* was to hold that warrantless searches of luggage absent an exigency are an invasion of a 'legitimate privacy interest' and cannot be justified under any of the long established exceptions to the Fourth Amendment requirement." (citation omitted).

315. "No person . . . shall be compelled in any criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

316. 378 U.S. 1, 6 (1964) ("The Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the States.").

317. 451 U.S. 454 (1981).

318. *Id.* at 456.

319. *Id.* The defendant's accomplice in a robbery shot and killed a grocery store clerk. *Id.*

320. *Id.* at 456-57.

stand trial.<sup>321</sup>

After a guilty verdict was rendered, a sentencing hearing was held before the same jury to determine whether the defendant should receive the death penalty.<sup>322</sup> At this hearing, one of the critical issues was whether it was probable that the defendant would commit violent criminal acts again; if so, he would be deemed a continuing threat to society.<sup>323</sup>

In a surprise move, the State called Dr. Grigson to testify, and the trial court denied the defense motion to exclude Dr. Grigson's testimony.<sup>324</sup> Dr. Grigson testified that the defendant was "a very severe sociopath" who "is going to . . . commit other similar or same criminal acts if given the opportunity to do so."<sup>325</sup> Dr. Grigson's testimony was the State's only evidence at the sentencing hearing.<sup>326</sup> The jury sentenced the defendant to death.<sup>327</sup>

Before the Supreme Court, the State maintained that the fifth amendment did not apply because the issue of Dr. Grigson's testimony arose during the penalty phase of the trial, after the defendant had

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321. *Id.* at 457-59.

322. *Id.* at 457. TEX. CRIM. PROC. CODE ANN. art. 37.071(a) (Vernon 1981) provides in pertinent part: "Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment."

323. 451 U.S. at 458. To aid a jury's determination, TEXAS CRIM. PROC. CODE ANN. art. 37.071(b) (Vernon 1981) provides three questions which, if answered affirmatively, mandate a sentence of death:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

324. 451 U.S. at 459. The defense objection was based on the fact that Dr. Grigson's name failed to appear on the list of witnesses for the state. *Id.* Therefore, the defense argued, admission of Dr. Grigson's testimony at the penalty stage violated a pretrial order barring testimony of any witness not named in the list of state witnesses. *Id.* Because the Court reversed the defendant's sentence on other constitutional grounds, it did not find it necessary to "reach the question of whether the failure to give advance notice of Dr. Grigson's appearance as a witness for the state deprived [the defendant] of due process." *Id.* at 473 n.17.

325. *Id.* at 459-60. A more detailed record of Dr. Grigson's testimony was set forth by the Court. Dr. Grigson testified that Smith was a severe sociopath who would continue his previous behavior, and that his condition would get only worse because there was no treatment available to modify or change his behavior. *Id.* (citing *Smith v. Estelle*, 602 F.2d 694, 697-98 (5th Cir. 1979)).

326. 451 U.S. at 460.

327. *Id.*

been found guilty.<sup>328</sup> The Court rejected this construction of the fifth amendment, holding that the fifth amendment is equally applicable to the penalty phase of a trial.<sup>329</sup> In reaching this conclusion, the Court emphasized "the gravity of the decision to be made at the penalty phase."<sup>330</sup>

The Court further rejected the State's argument that because the defendant's response to the psychiatric evaluation was nontestimonial, the fifth amendment was inapplicable.<sup>331</sup> The Court distinguished admitting into evidence conclusions drawn from communications with the defendant from nontestimonial evidence such as handwriting,<sup>332</sup> blood samples,<sup>333</sup> and lineup identifications.<sup>334</sup> Accordingly, the Court held that because Dr. Grigson's conclusions were based largely on the defendant's verbal account of the crime, the fifth amendment was applicable.<sup>335</sup>

The key factor in the Court's decision was that neither the defendant nor his counsel had any reason to believe that the defendant's statements during the psychiatric examination could be used for any purpose other than to determine his competency to stand trial.<sup>336</sup> Nevertheless, Smith's unguarded statements during the psychiatric examination led to Dr. Grigson's conclusions which in turn became the basis for the death sentence.<sup>337</sup>

By reaffirming the proposition that "[t]he Fifth Amendment privi-

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328. *Id.* at 462.

329. *Id.* at 462-63.

330. *Id.* at 463 (citing *Green v. Georgia*, 442 U.S. 95, 97 (1979) (constitutional guarantee to fair trial equally applicable to penalty phase of trial); *Presnell v. Georgia*, 439 U.S. 14, 16 (1978) ("[F]undamental principles of procedural fairness apply with no less force at the penalty phases of a trial in a capital case than they do in the guilt-determining phase of any criminal trial."); *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (because "the sentencing is a critical stage of the criminal proceeding" the requirements of due process must be satisfied)). The Court also relied upon language in *In re Gault*, 387 U.S. 1, 49 (1967), which extended the scope of the fifth amendment to juvenile proceedings: "the availability of the [fifth amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." 451 U.S. at 462.

331. 451 U.S. at 463-65.

332. *Id.* See *Gilbert v. California*, 388 U.S. 263, 266-67 (1967).

333. 451 U.S. at 463-65. See *Schmerber v. California*, 384 U.S. 757, 761 (1966) (fifth amendment protects defendant only from compelled testimony or from otherwise providing State with evidence of a testimonial or communicative nature).

334. 451 U.S. at 463-65. See *United States v. Wade*, 388 U.S. 218, 221-23 (1967).

335. 451 U.S. at 464-65.

336. *Id.* at 466.

337. *Id.*

lege is 'as broad as the mischief against which it seeks to guard,'"<sup>338</sup> the Court supported its finding that "[t]he considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue."<sup>339</sup> The Court further reasoned that if Dr. Grigson's conclusions had been confined to their original purpose, there would have been no fifth amendment violation.<sup>340</sup> The Court explained:

When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a post-arrest custodial setting.<sup>341</sup>

The Court also found it significant that the defendant neither initiated the psychiatric evaluation nor attempted to introduce psychiatric evidence.<sup>342</sup> Thus, the Court distinguished the psychiatric evaluation in *Smith* from "a sanity examination occasioned by a defendant's plea of not guilty by reason of insanity."<sup>343</sup> The Court explained that the privilege against self-incrimination does not apply to examinations necessitated by an insanity plea: once a defendant puts his mental health into issue, "his silence may deprive the State of the only effective means it has of controverting [the defendant's] proof *on an issue that he interjected into the case.*"<sup>344</sup>

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338. *Id.* at 467-68 (quoting *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892)).

339. 451 U.S. at 467.

340. *Id.* at 465.

341. *Id.* at 467.

342. *Id.* at 465-66.

343. *Id.* at 465.

344. *Id.* (emphasis added). Five circuit courts of appeal have held that if a defendant pleads insanity, he must submit to a state sanity examination. *United States v. Cohen*, 530 F.2d 43, 47 (5th Cir.) (upholding "compelled psychiatric examinations when a defendant has raised the insanity defense"), *cert. denied*, 429 U.S. 855 (1976); *Karstettler v. Cardwell*, 526 F.2d 1144, 1145 (9th Cir. 1975) ("[O]nce a defendant indicates his intention to invoke the insanity defense and present expert testimony on the issue, he may be ordered to submit to a psychiatric examination by psychiatrists available to testify for the government . . . ."); *United States v. Weiser*, 428 F.2d 932, 936 (2d Cir. 1969) ("[T]he fifth amendment is not violated by allowing a psychiatrist to testify on the basis of an examination of defendant to which the latter was ordered to submit."), *cert. denied*, 402 U.S. 949 (1971); *United States v. Albright*, 388 F.2d 719, 724-25 (4th Cir. 1968) (Government's burden of proof regarding defendant's sanity requires access to defendant for sanity evaluation); *Pope v. United States*, 372 F.2d 710, 720-21 (8th Cir. 1967) (en banc) (defense right to refuse Government psychiatric examination waived by presenting psychiatric testimony on insanity issue), *vacated on other grounds*, 392 U.S. 651 (1968).

Moreover, the *Smith* Court noted that a similar issue was "carefully left open" by the

While *Smith* appears at first glance to be an uncharacteristically broad extension of the fifth amendment by the Burger Court, the Court actually narrowed its decision by specifying similar circumstances in which the privilege would *not* apply.<sup>345</sup> Moreover, the Court was reluctant to extend the privilege against self-incrimination beyond statements made to a police officer or government agent, as was evident in its conclusion that Dr. Grigson, by testifying against the defendant, became, in effect, "an agent of the State."<sup>346</sup>

In addition to the fifth amendment violation, the *Smith* Court held that the defendant's sixth amendment right to counsel had been abridged.<sup>347</sup> *Smith* had been indicted and counsel appointed before the psychiatric examination. Because counsel was not present during the examination, the Court concluded that *Smith* was denied the assistance of counsel during a critical stage of the proceedings.<sup>348</sup>

Justice Powell joined in Justice Stewart's concurring opinion, supporting the decision's sixth amendment ground.<sup>349</sup> They considered this a sufficient basis to affirm the court of appeals without reaching the fifth amendment issue.<sup>350</sup> Justice Rehnquist concurred separately on the sixth amendment ground, but vigorously opposed the decision's fifth amendment ground.<sup>351</sup> He did not consider *Smith*'s fifth amendment rights implicated because Dr. Grigson's examination did not constitute "the inherently coercive situation considered in *Miranda*."<sup>352</sup> Justice Rehnquist further argued that even if *Smith*'s fifth amendment rights were implicated, he had waived them by failing to invoke them when questioned by Dr. Grigson.<sup>353</sup> Although acknowledging that the

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court of appeals: "the possibility that a defendant who wishes to use psychiatric evidence in his own behalf [on the issue of future dangerousness] can be precluded from using it unless he is [also] willing to be examined by a psychiatrist nominated by the state." 451 U.S. at 466 n.10 (quoting *Smith v. Estelle*, 602 F.2d 694, 705 (5th Cir. 1979)).

345. Sanity examinations necessitated by defendants' putting their mental health in issue was an example cited by the *Smith* Court. 451 U.S. at 465.

346. *Id.* at 467. It is interesting to note, as did the court of appeals, that Dr. Grigson was often an expert witness for the State, but never a witness for the defense. Also, when appointed in other cases to determine only a defendant's competency to stand trial, Dr. Grigson often drew the conclusion that the defendant was a "sociopath" and/or was likely to commit crimes in the future. The court of appeals cited fifteen Texas cases as authority for these statements. *Smith v. Estelle*, 602 F.2d at 700-01 n.7.

347. 451 U.S. at 469.

348. *Id.*

349. *Id.* at 474 (Stewart, J., concurring).

350. *Id.*

351. *Id.* (Rehnquist, J., concurring).

352. *Id.* at 475.

353. *Id.*



right against self-incrimination is not self-executing, Justice Rehnquist considered the requirement of giving *Miranda* warnings inapplicable "outside the context of the inherently coercive custodial interrogations for which [they were] designed."<sup>354</sup>

In contrast, the majority's decision to base its opinion on the fifth, as well as the sixth, amendment indicates the strong weight it accorded to the fifth amendment issues involved. Thus, *Estelle v. Smith* may be viewed as a firm, albeit narrow, extension of *Miranda*.

*b. interrogation following request for counsel*

In *Edwards v. Arizona*,<sup>355</sup> the Supreme Court re-examined the requirements for establishing a valid waiver of the right to counsel. Defendant Edwards was arrested for murder and was informed of his *Miranda* rights.<sup>356</sup> Thereafter, he submitted to police questioning which ceased when Edwards refused to answer further questions until he could consult an attorney.<sup>357</sup>

The following day, interrogation resumed, although Edwards had not been provided with counsel.<sup>358</sup> When Edwards objected, a guard told him that "he had" to talk."<sup>359</sup> After receiving additional *Miranda* warnings, Edwards listened to a tape recording in which an accomplice incriminated him in the murder.<sup>360</sup> Minutes later, he confessed.<sup>361</sup>

Before trial, Edwards moved to suppress his confession on the ground that it had been obtained in violation of his *Miranda* rights.<sup>362</sup> The trial court denied his motion.<sup>363</sup> The Arizona Supreme Court upheld Edwards' conviction, finding that he had confessed voluntarily, after waiving his right to counsel.<sup>364</sup>

The Supreme Court began its analysis by noting that the Arizona Supreme Court determined Edwards' admission to be voluntary under the totality of circumstances standard as announced in *Schneckloth v.*

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354. *Id.* (quoting *Roberts v. United States*, 445 U.S. 552, 560 (1980)).

355. 451 U.S. 477 (1981).

356. *Id.* at 478. See *Miranda v. Arizona*, 384 U.S. 436, 467-73 (1966).

357. 451 U.S. at 479. Edwards specifically stated: "I want an attorney before making a deal." *Id.*

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* "If the accused indicates that he wishes to remain silent, 'the interrogation must cease.' If he requests counsel, 'the interrogation must cease until an attorney is present.'"  
*Id.* at 482 (quoting *Miranda v. Arizona*, 384 U.S. 436, 474 (1966)).

363. 451 U.S. at 479-80.

364. *Id.* at 480.

*Bustamonte*.<sup>365</sup> The *Edwards* Court reasoned that because *Bustamonte* involved consent to search and waiver of fourth amendment rights while *Edwards* involved waiver of the right to counsel, *Bustamonte* was not controlling.<sup>366</sup> The Court relied instead on *Johnson v. Zerbst*<sup>367</sup> for the rule that although waiver of counsel must be voluntary it "must also constitute a knowing and intelligent relinquishment . . . of a known right or privilege, a matter which depends in each case 'upon the particular facts and circumstances surrounding that case.'"<sup>368</sup>

The *Edwards* Court reaffirmed that additional protection is required when a defendant has invoked the right to the presence of counsel during custodial interrogation.<sup>369</sup> Under such circumstances, waiver cannot be established by proving only that the accused has responded to police-initiated reinterrogation even if the defendant has been given *Miranda* warnings.<sup>370</sup> The Court characterized communication initiated by the accused as a necessary fact among the totality of circumstances considered in determining the validity of the waiver,<sup>371</sup> and concluded that unless a defendant initiates further communication with the police, he or she "is not subject to further interrogation . . . until counsel has been made available."<sup>372</sup>

The practical application of the Court's "initiation by the accused" requirement appears to modify the waiver standard of *Zerbst* in that the totality of the circumstances surrounding a given case need not be considered when police initiate a conversation that results in interrogation.<sup>373</sup> Under these circumstances it appears that there can be no

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365. *Id.* at 483 (citing 412 U.S. 218, 227 (1973)).

366. 451 U.S. at 483.

367. 304 U.S. 458 (1938).

368. 451 U.S. at 482 (quoting *Zerbst*, 304 U.S. at 464). The *Edwards* Court noted that *Bustamonte* itself emphasized that questions of voluntariness and knowing and intelligent waiver are discrete inquiries. 451 U.S. at 484.

369. 451 U.S. at 484; *see id.* at 483 (citing *Bustamonte*, 412 U.S. at 241 (right to counsel a prime example of rights requiring special protection of *Zerbst* standard)).

370. 451 U.S. at 484 (citing *Brewer v. Williams*, 430 U.S. 386 (1977)).

371. 451 U.S. at 486 n.9. The Court's placement of "initiation by the accused" within the context of the totality of the circumstances indicates that the Court did not consider proof of such initiation sufficient in itself to establish waiver.

372. *Id.* at 484-85 (construing *Rhode Island v. Innis*, 446 U.S. 291 (1980); *Fare v. Michael C.*, 442 U.S. 707 (1979); *Michigan v. Mosley*, 423 U.S. 96 (1975); *Miranda v. Arizona*, 384 U.S. 436 (1966)).

373. Justice Powell found the majority opinion unclear but noted that it could be read to establish a new per se rule that requires a threshold inquiry as to who initiated any exchange between an accused and the police. 451 U.S. at 489-90 (Powell, J., concurring). He criticized this interpretation as superimposing a new element of proof on the doctrine of waiver established in *Zerbst*. *Id.* at 490. Justice Powell reasoned that unless the traditional standard were shown to be ineffective, this imposition would be unjustified and noted that there

waiver and the fifth amendment would require the suppression of post-arrest statements at defendant's trial.<sup>374</sup> While the full impact of *Edwards* awaits future articulation, the Court's emphasis on "initiation by the accused" seems to reflect an attempt to create a practical procedural safeguard of a defendant's fifth amendment rights in keeping with the tradition of *Miranda* and its progeny.

*c. use of defendant's tape-recorded statements*

In *United States v. Kenny*,<sup>375</sup> a tape recording of an incriminating telephone call between the defendant and his co-conspirator/government informer was played before the jury, ostensibly to impeach Kenny's testimony.<sup>376</sup> Kenny asserted that the tape had been obtained in violation of his privilege against self-incrimination and should have been suppressed.<sup>377</sup> The Ninth Circuit held that because the tape had not been obtained during custodial interrogation, there was no fifth amendment violation.<sup>378</sup>

*d. statements made during customs searches*

In *United States v. Estrada-Lucas*,<sup>379</sup> the Ninth Circuit addressed the admissibility of statements made to customs agents before receipt of *Miranda* warnings. A customs search of defendant's luggage at the California-Mexico border revealed ten tablecloths and three bags of gold jewelry worth approximately \$19,000.<sup>380</sup> After the customs agent had discovered the first bag of jewelry, he asked the defendant what was in the bag, and she replied, "It's jewelry."<sup>381</sup> While the agent was removing the other two bags, Estrada-Lucas volunteered that she was merely delivering the jewelry to its owner, but after further questioning

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has been "no indication . . . that *Zerbst* and its progeny have failed to protect constitutional rights." *Id.* at 492 n.2.

374. *See id.* at 480.

375. 645 F.2d 1323 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981).

376. *Id.* at 1337.

377. *Id.* at 1338.

378. *Id.* In reaching its decision, the court cited *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam) (upholding burglary conviction where suspect voluntarily went to police station and confessed during interview: "*Miranda* warnings are required only when there has been such a restriction on a person's freedom as to render him 'in custody.'"); and *United States v. Beckwith*, 425 U.S. 341, 347-48 (1976) (no fifth amendment violation from failure to give *Miranda* warnings before interrogating defendant in his home because setting not coercive or custodial).

379. 651 F.2d 1261 (9th Cir. 1980).

380. *Id.* at 1262.

381. *Id.*

by another agent, the defendant admitted that the jewelry was hers.<sup>382</sup>

On appeal, Estrada-Lucas argued that her statements to the customs agents should have been suppressed because they had been elicited without prior *Miranda* warnings.<sup>383</sup> She contended that the *Miranda* warnings should have been given when the agent had probable cause to arrest: when he discovered the tablecloths and the first bag of jewelry.<sup>384</sup> The Ninth Circuit applied the test it established in *Chavez-Martinez v. United States*<sup>385</sup> for determining when customs agents are required to administer *Miranda* warnings.<sup>386</sup>

The court first questioned when the agents had probable cause to arrest, and then whether Estrada-Lucas had been in custody.<sup>387</sup> It held that probable cause had been established upon discovery of the first bag of jewelry, because "it was reasonable to believe that . . . the jewelry . . . was not part of [Estrada-Lucas's] personal wardrobe."<sup>388</sup> The court then applied the test it established in *United States v. Luther*<sup>389</sup> for determining when custody occurs during a customs search.<sup>390</sup> It found that Estrada-Lucas *had* been in custody because: (1) both customs agents considered that defendant had not been free to leave during the search; (2) Estrada-Lucas had been confronted with evidence of her guilt; and (3) the discovery of the jewelry and tablecloths had been treated as more than a mere administrative matter.<sup>391</sup> The court concluded that the defendant's statements to the customs agent prior to *Miranda* warnings should have been excluded, and the conviction was reversed.<sup>392</sup>

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382. *Id.*

383. *Id.* at 1265.

384. *Id.*

385. 407 F.2d 535, 539 (9th Cir.) ("[T]he warning required in *Miranda* need not be given to one who is entering the United States unless and until the questioning agents have probable cause to believe that the person questioned has committed an offense, or the person questioned has been arrested, whether with or without probable cause."), *cert. denied*, 396 U.S. 858 (1969).

386. 651 F.2d at 1265 (citing *Chavez-Martinez*, 407 F.2d at 539).

387. 651 F.2d at 1265-66. The Ninth Circuit noted that the *Chavez-Martinez* test contains a "probable cause" element, and, implicitly, a "custody" element. *Id.* at 1265.

388. *Id.* at 1265-66.

389. 521 F.2d 408 (9th Cir. 1975) (per curiam) (when circumstances indicated seizure merely administrative matter, defendant found not in custody). The *Luther* test addresses: (1) the language used to summon the defendant; (2) the physical surroundings of the interrogation; (3) the extent to which the defendant had been confronted with evidence of his or her guilt; and (4) the pressure exerted to detain the defendant. *Id.* at 410-11.

390. 651 F.2d at 1266 (citing *Luther*, 521 F.2d at 410-11).

391. 651 F.2d at 1266.

392. *Id.*

## 2. "No adverse inference" jury instruction

In *Carter v. Kentucky*,<sup>393</sup> the Court addressed an issue specifically reserved in *Griffin v. California*.<sup>394</sup> whether under the fifth amendment a defendant has the right to an instruction that the jury may not infer guilt from the defendant's failure to testify.<sup>395</sup>

Fearing that evidence of his prior felony convictions would be too prejudicial, Carter chose not to testify at his trial for burglary.<sup>396</sup> The trial judge refused to give the following requested jury instruction: "The [defendant] is not compelled to testify and the fact that he does not cannot be used as an inference of guilt and should not prejudice him in any way."<sup>397</sup> The Kentucky Supreme Court upheld the defendant's conviction,<sup>398</sup> relying on Kentucky statutory<sup>399</sup> and case law<sup>400</sup> that prohibited commentary on a defendant's failure to testify. The court concluded that the instruction would have constituted an impermissible commentary.<sup>401</sup>

Although the United States Supreme Court had decided a similar issue over forty years earlier in *Bruno v. United States*,<sup>402</sup> *Bruno* involved the construction of a federal statute<sup>403</sup> rather than the applicability of the fifth amendment. The Court therefore relied upon two more recent decisions, *Griffin v. California*<sup>404</sup> and *Lakeside v. Oregon*,<sup>405</sup> to hold that a state trial court is constitutionally obligated to give a "no-inference" jury instruction when so requested.<sup>406</sup>

In *Griffin*, the Court set forth the "no comment" rule, holding that no *adverse* commentary on the defendant's failure to testify could be

393. 450 U.S. 288 (1981).

394. 380 U.S. 609, 615 n.6 (1965).

395. 450 U.S. at 289-90.

396. *Id.* at 292-93. Defense counsel described the defendant's position as caught "between a rock and a hard place." *Id.* at 293 n.4.

397. *Id.* at 294 (brackets in original).

398. *Id.* at 295.

399. KY. REV. STAT. § 421.225 (Supp. 1980): "In any criminal or penal prosecution the defendant, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon or create any presumption against him."

400. *Green v. Commonwealth*, 488 S.W.2d 339, 341-42 (1972).

401. 450 U.S. at 295.

402. 308 U.S. 287, 294 (1939) (federal statute prohibiting presumption of guilt arising from defendant's failure to testify interpreted to require a "no-inference" jury instruction if defendant so requests).

403. Act of March 16, 1878, 20 Stat. 30, codified at 18 U.S.C. § 3481 (1976), prohibits creating any presumption from a defendant's failure to testify.

404. 380 U.S. 609 (1965).

405. 435 U.S. 333 (1978).

406. 450 U.S. at 305.

made in the presence of the jury.<sup>407</sup> The Court in *Lakeside* went further and upheld the constitutionality of a "no-inference" instruction that was given over the defendant's objection.<sup>408</sup> The *Lakeside* Court reasoned that *Griffin* prohibited only *adverse* comment on a defendant's refusal to testify.<sup>409</sup>

Noting the importance of a "no-inference" instruction, the *Carter* Court explained that "[t]oo many, even those who should be better advised, view this [fifth amendment] privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are . . . guilty of crime . . . ." <sup>410</sup> Furthermore, the juror may not realize the many valid reasons a defendant may have for choosing not to testify.<sup>411</sup> This concern was voiced by Justice Stewart in his dissent in *Griffin*,<sup>412</sup> and again in his majority opinion in *Carter*. He explained that unjust penalties may result "when the jury is left to roam at large with only its untutored instincts to guide it, to draw from the defendant's silence broad inferences of guilt."<sup>413</sup> The Court concluded that a state trial judge must, upon proper request, "minimize the danger that the jury will give evidentiary weight to a defendant's failure to testify" in his own behalf.<sup>414</sup>

Justice Powell, who concurred in the result, and Justice Rehnquist, who dissented, questioned whether the fifth amendment requires a "no-inference" jury instruction when requested by the defendant.<sup>415</sup> Although Justice Powell disagreed with *Griffin*, he concurred in *Carter* in order to follow precedent.<sup>416</sup> Justice Rehnquist, on the other hand, at-

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407. 380 U.S. at 614-15. The *Griffin* Court reasoned that commenting on the defendant's exercise of his fifth amendment right not to testify "cuts down on the privilege by making its assertion costly." *Id.* at 614.

408. 435 U.S. at 340-41.

409. *Id.* at 338-39. "It would be strange indeed to conclude that this cautionary instruction violates the very constitutional provision it is intended to protect." *Id.* at 339.

410. 450 U.S. at 302 (quoting *Ullmann v. United States*, 350 U.S. 422, 426 (1956)).

411. These reasons include, as in *Carter*, fear of impeachment by prior convictions. In addition, "[e]xcessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass [a defendant] to such a degree as to increase rather than remove prejudices against him." 450 U.S. at 300 n.15 (quoting *Wilson v. United States*, 149 U.S. 60, 66 (1893)).

412. 380 U.S. at 621 (Stewart, J., dissenting).

413. 450 U.S. at 301. The Court reinforced this statement with a public opinion survey's finding "that 37% of those interviewed believed that it is the responsibility of the accused to prove his innocence." *Id.* at 303 n.21 (citing 64 A.B.A.J. 653 (1978)).

414. 450 U.S. at 305.

415. *Id.* at 305-07 (Powell, J., concurring); *id.* at 307-10 (Rehnquist, J., dissenting).

416. *Id.* at 305-07 (Powell, J., concurring). Justice Powell argued that the Constitution does not require jurors to set aside "logical inferences" when a defendant chooses not to

tacked the majority's decision as veering impermissibly from constitutional paths.<sup>417</sup>

Justice Powell's and Justice Rehnquist's reservations in the *Carter* decision reflect their policy of strictly construing the Constitution. One of the Constitution's inherent qualities is its flexibility to reach and prevent practices that may undercut its specific provisions. The *Carter* majority relied on this quality in reasoning that to protect the meaningful exercise of the right to remain silent, the Constitution guarantees that "no adverse inferences . . . be drawn from the exercise of that privilege."<sup>418</sup> The jury instruction required under *Carter* merely functions to "limit the jurors' speculation on the meaning of [the defendant's] silence" in order to avoid exacting "an impermissible toll on the full and free exercise of the privilege."<sup>419</sup>

### 3. Production of business records

In two recent cases, *United States v. Alderson*<sup>420</sup> and *United States v. MacKey*,<sup>421</sup> the Ninth Circuit considered the fifth amendment privilege against self-incrimination as it relates to the production of business records. In *Alderson*, the Internal Revenue Service issued a summons for production of records of Perfection Produce-Alderson Brothers, a farming partnership maintained by defendant and his brother.<sup>422</sup> The defendant refused to comply with the summons, asserting his fifth amendment privilege against self-incrimination.<sup>423</sup> In determining whether the Alderson partnership had "an institutional identity independent of its members,"<sup>424</sup> the Ninth Circuit relied on the Supreme Court holding in *Bellis v. United States*<sup>425</sup> that "the privilege against self-incrimination is personal, [and] . . . may not be invoked to avoid producing records of an artificial organization which are held in a rep-

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explain incriminating circumstances, *id.* at 306, but he concluded that under *Griffin* the defendant was entitled to the instruction. *Id.* at 307.

417. *Id.* at 310 (Rehnquist, J., dissenting). Justice Rehnquist characterized the majority opinion as allowing a criminal defendant "to take from the trial judge any control over" jury instructions. *Id.* He argued that neither *Griffin* nor the Constitution entitled the defendant to such a result. *Id.* at 308-10.

418. *Id.* at 305 (citing *Griffin*, 380 U.S. at 609).

419. 450 U.S. at 305.

420. 646 F.2d 421 (9th Cir. 1981).

421. 647 F.2d 898 (9th Cir. 1981).

422. 646 F.2d at 422.

423. *Id.*

424. *Id.* at 422.

425. 417 U.S. 85 (1974).

representative capacity."<sup>426</sup>

The *Alderson* court found striking similarities between the facts in *Bellis* and those in the case at bar.<sup>427</sup> In *Bellis*, the Supreme Court held that the fifth amendment privilege against self-incrimination cannot be asserted by individual partners as a defense to noncompliance with a subpoena for partnership records.<sup>428</sup> The court further held that neither the size of the business entity nor insubstantial differences in the form of the business warranted a different holding.<sup>429</sup> Despite the similarities between *Bellis* and *Alderson*, however, *Alderson* asserted that dictum in *Bellis*<sup>430</sup> made the family nature of the *Alderson* partnership a distinguishing factor.<sup>431</sup>

The court of appeals rejected this argument and adopted the approach of the other circuits that have addressed the issue, *i.e.*, that a family relationship is just one factor bearing on the issue of the organization's separate identity from its individual members.<sup>432</sup> The court stated that when "the facts overwhelmingly point to the existence of a separate entity with an institutional identity, the existence of a family relationship . . . will not overcome this conclusion."<sup>433</sup> *Alderson*, though perhaps contrary to unexplained dictum in *Bellis*, comports with the Supreme Court interpretation of the fifth amendment privilege against self-incrimination "as personal in the sense that it applies only

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426. 646 F.2d at 422 (citing *Bellis v. United States*, 417 U.S. at 89-90). The *Bellis* Court stated that the organization must be:

recognized as an independent entity apart from individual members. The group must be relatively well organized and structured, and not merely a loose, informal association of individuals. It must maintain a distinct set of organizational records, and recognize rights in its members of control and access to them. And the records subpoenaed must in fact be organizational records held in a representative capacity. In other words, it must be fair to say that the records demanded are the records of the organization rather than those of the individual . . . .

*Id.* at 92-93.

427. 646 F.2d at 423. Perfection Produce-Alderson Bros. had existed for 20 years, had six permanent employees, 75 seasonal farm workers, a separate business bank account, and had filed separate partnership tax returns in 1976 and 1977. *Id.* *Bellis* involved a three-man law firm with an established name, six full-time employees, a separate business bank account, and it had filed separate partnership tax returns. *See* 417 U.S. at 95-97.

428. 417 U.S. at 100-01.

429. *Id.*

430. "This might be a different case if it involved a small family partnership." *Id.* at 101.

431. 646 F.2d at 423.

432. *Id.* *See, e.g.*, *United States v. Hankins*, 565 F.2d 1344, 1349 (5th Cir. 1978) (a partnership between two brothers), *cert. denied*, 440 U.S. 909 (1979); *United States v. Mahady & Mahady*, 512 F.2d 521, 523-24 (3d Cir. 1975) (family law partnership).

433. 646 F.2d at 423.



to an individual's words or personal papers.' ”<sup>434</sup>

In *United States v. MacKey*,<sup>435</sup> the Ninth Circuit addressed the characterization of records having both business and personal functions. MacKey had been charged with price-fixing.<sup>436</sup> The Government sought to discover diaries, calendars, and appointment books used by MacKey as vice-president and general manager of a roofing construction corporation.<sup>437</sup> Although these records had been used in the corporation's daily business, MacKey argued that they were, nevertheless, personal notations and were used only by himself.<sup>438</sup> Therefore, he argued, they were protected against compulsory production under the privilege against self-incrimination.<sup>439</sup>

The Ninth Circuit followed the reasoning of a line of district court cases which held that “mixed documents are corporate and outside the privilege.”<sup>440</sup> The court concluded that although some facts might indicate that the documents were MacKey's personal papers, the documents were in fact “mixed,” and therefore were outside the scope of fifth amendment protection.<sup>441</sup>

#### 4. Compulsory testimony

Recently, the Ninth Circuit considered two cases involving a defendant's objection to the court's failure to compel testimony from a witness. In *United States v. Tsui*,<sup>442</sup> the court upheld the defendant's

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434. 417 U.S. at 87 (quoting *In re Grand Jury Investigation (Bellis)*, 483 F.2d 961, 962 (3d Cir. 1973)).

435. 647 F.2d 898 (9th Cir. 1981).

436. MacKey was charged “with conspiring to rig bids and prices in the panelized roofing construction industry” in violation of 15 U.S.C. § 1 (1976). 647 F.2d at 899.

437. 647 F.2d at 899.

438. *Id.* at 900-01. In drawing this distinction between personal and corporate records, MacKey also noted that the records “were not documents required by law to be kept for regulatory or tax purposes.” *Id.* at 900. *Cf. In re Grand Jury Proceedings (McCoy and Sussman)*, 601 F.2d 162, 168 (5th Cir. 1979) (records of sole proprietor kept pursuant to United States Customs regulations not protected by fifth amendment).

439. 647 F.2d at 900.

440. *Id.* at 900. *See United States v. Waltman*, 394 F. Supp. 1393 (W.D. Pa. 1975) (diary used to substantiate corporate entertainment expenses held to be corporate record unprotected by fifth amendment), *vacated on other grounds*, 525 F.2d 371 (3d Cir. 1975); *In re Grand Jury Investigation*, 338 F. Supp. 1379, 1380 (W.D. Pa. 1972) (desk calendar used for business and personal purposes by defendant as corporate board chairman held to be corporate because of corporation's “constructive possession” of the calendar); *United States v. American Radiator & Standard Sanitary Corp.*, 278 F. Supp. 608, 616 (W.D. Pa. 1967) (fifth amendment privilege inapplicable to corporate documents despite personal notations therein).

441. 647 F.2d at 901.

442. 646 F.2d 365 (9th Cir. 1981).

conviction for income tax evasion over his claim that the trial court had abused its discretion in limiting his examination of two defense witnesses. The first witness, who was the subject of the same investigation that led to Tsui's indictment, asserted a blanket claim of fifth amendment privilege, refusing to answer any substantive questions.<sup>443</sup> The court noted that ordinarily a claim of privilege must be made in response to specific questions to allow the reviewing court to decide whether substantive responses could lead to injurious disclosures.<sup>444</sup> An exception to the general rule arises, however, if the trial court can conclude on the basis of its knowledge of the case and the anticipated testimony that the witness could legitimately assert the privilege in response to all relevant questions.<sup>445</sup> The Ninth Circuit ruled the exception applicable,<sup>446</sup> rejecting Tsui's contention that potential prosecution of the witness was time barred.<sup>447</sup>

Tsui also challenged the district court's refusal to permit the defense to ask leading questions on direct examination of an IRS investigating officer,<sup>448</sup> who Tsui claimed was an adverse witness. The Ninth Circuit found some merit in Tsui's argument<sup>449</sup> but agreed with the

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443. *Id.* at 365-66.

444. *Id.* at 367. *But see* *United States v. Pierce*, 561 F.2d 735, 741 (9th Cir. 1977), *cert. denied*, 435 U.S. 923 (1978). The standard for sustaining a claim of privilege was set out in *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951). In *Hoffman*, a witness in an extensive grand jury racketeering investigation refused to answer questions pertaining to his own activities during the time in question and whereabouts of another witness for whom a bench warrant had been issued. The Supreme Court reversed his conviction for criminal contempt, holding that "[t]o sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.* at 486-87.

445. 646 F.2d at 367-68.

446. *Id.* The witness in *Tsui* was "up to his neck" in criminal investigations and it was highly likely that any evidence at all would tend to incriminate him. *Id.* *See Hoffman v. United States*, 341 U.S. 479, 486 (1951) ("The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." (citation omitted)). The fact that the *Hoffman* defendant was a known racketeer with a twenty-year police record was sufficient proof that the questions posed "could easily have required answers that would forge links in a chain of facts imperiling petitioner with conviction of a federal crime." *Id.* at 488. *Cf. United States v. Neff*, 615 F.2d 1235, 1239-41 (9th Cir.) (defendant in tax fraud case could not rely upon privilege as complete defense to failure to file tax return when questions on return did not suggest that response would be incriminating and it was apparent that his failure was motivated by desire to protest taxes rather than by fear of self-incrimination), *cert. denied*, 447 U.S. 925 (1980).

447. 646 F.2d at 368.

448. *Id.*

449. *Id.*; *see United States v. Bryant*, 461 F.2d 912, 917-18 (6th Cir. 1972), in which the

trial court that his offer of proof as to the relevance of the anticipated testimony was deficient.<sup>450</sup> Accordingly, the court held that any error by the district court in limiting the questioning was not so prejudicial as to warrant reversal.<sup>451</sup>

In *United States v. Valencia*,<sup>452</sup> the Ninth Circuit upheld a prospective defense witness' refusal to testify on fifth amendment grounds.<sup>453</sup> Three defendants, Del Real, Duarte, and Valencia had been indicted for conspiracy to distribute heroin and cocaine and for the substantive offense of distribution.<sup>454</sup> Del Real pled guilty to the distribution charge, and the Government moved to dismiss the conspiracy charge.<sup>455</sup> Before the court had accepted Del Real's guilty plea, however, and while the Government's motion to dismiss the conspiracy charge was pending, Duarte and Valencia called upon Del Real to testify at their trial.<sup>456</sup> Del Real refused, asserting his privilege against self-incrimination.<sup>457</sup>

On appeal from their convictions, Valencia and Duarte argued that Del Real could not have validly invoked the privilege against self-incrimination because he was no longer exposed to criminal prosecution.<sup>458</sup> The Government contended that Del Real was still subject to

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court stated that Federal Rule of Civil Procedure 43(b), which allows leading questions of adverse witnesses, should apply even more strongly in criminal cases where the defendant is entitled to every available means of ascertaining the truth, but the hostility of the witness must be shown before any such questioning takes place. In *Bryant*, however, there was no showing that the witness, an informant, was hostile—defense counsel had spoken with him before trial and had received a copy of the statement given to the Government. Further, he was not an experienced informant, and both his reliability and allegiance were uncertain. *Id.* at 919. See also *United States v. Freeman*, 302 F.2d 347, 350-51 (2d Cir. 1962), *cert. denied*, 375 U.S. 958 (1963). In *Freeman*, the court noted that while Federal Rule of Civil Procedure 43(b) allows leading questions of adverse witnesses, there is no similar provision in the Federal Rules of Criminal Procedure. The court reasoned, however, that "there is even more reason for permitting such practice in criminal cases where every proper means of ascertaining the truth should be placed at the defendant's disposal." *Id.* at 351.

450. 646 F.2d 368-69. The court did not explain why the proffered evidence would not be relevant.

451. *Id.* (citing *Nutter v. United States*, 412 F.2d 178, 182-83 (9th Cir. 1969) (refusal to declare informant hostile witness and allow leading questions as to informant's prior criminal record was not abuse of discretion because there was no showing that such evidence was material to defense or that it would demonstrate prejudice or bias), *cert. denied*, 397 U.S. 927 (1970)).

452. 656 F.2d 412 (9th Cir. 1981).

453. *Id.* at 416.

454. *Id.* at 413.

455. *Id.* at 416.

456. *Id.*

457. *Id.*

458. *Id.*

possible state prosecution, and that because the trial judge had neither accepted his guilty plea, nor ruled on the motion to dismiss, Del Real's refusal to testify was based on a valid fear of self-incrimination.<sup>459</sup> The Ninth Circuit upheld Del Real's assertion of the privilege, reasoning that Del Real *had* been subject to criminal liability when he refused to testify.<sup>460</sup>

## 5. Waiver

In *United States v. Mayo*,<sup>461</sup> the Ninth Circuit rejected the defendant Mayo's assertion that he had been compelled to incriminate himself in the jury's presence by answering the court's question regarding his knowledge of his co-defendant's whereabouts.<sup>462</sup> Mayo contended that by answering the question he was compelled to incriminate himself by revealing to the jury his association with his co-defendant, who had just been identified as a resident of a half-way house for alcohol and drug abusers, addicts, and federal prisoners.<sup>463</sup>

The Ninth Circuit considered the danger of incrimination too "remote" and "speculative" to deserve fifth amendment protection, because "overwhelming evidence" had already linked the two defendants.<sup>464</sup> Further, the court concluded that Mayo waived any fifth amendment privilege when he answered the court's question voluntarily and without objection from defense counsel.<sup>465</sup>

In *United States v. Dufur*,<sup>466</sup> the defendant asserted that the "mobile booking van" in which he had been transported was so coercive a setting that his confession to murdering a customs inspector had been

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459. *Id.*

460. *Id.* The Ninth Circuit rested its decision on a comparison of the *Valencia* facts with those of *United States v. Trejo-Zambrano*, 582 F.2d 460, 464 (9th Cir.) (valid assertion of privilege while witness was awaiting sentencing), *cert. denied*, 439 U.S. 1005 (1978) and *United States v. Roberts*, 503 F.2d 598, 600 (9th Cir. 1974) (valid assertion of privilege while five of six counts were pending), *cert. denied*, 419 U.S. 1113 (1975).

461. 646 F.2d 369 (9th Cir. 1981).

462. *Id.* at 376. Before the jury had been excused for the evening, the judge asked Mayo to confirm that his co-defendant was en route to the courtroom from Reality House. *Id.* at 375-76. Reality House is a "half-way house" residence for alcohol and drug abusers, addicts, and federal prisoners. *Id.* at 376 n.2.

463. *Id.* at 376.

464. *Id.* In reaching this conclusion, the Ninth Circuit cited *Zicarelli v. New Jersey Comm'n of Investigation*, 406 U.S. 472, 478 (1972) (invalid assertion of fifth amendment privilege after defendant had been granted immunity: "the privilege protects against real dangers, not remote and speculative possibilities.").

465. 646 F.2d at 376.

466. 648 F.2d 512 (9th Cir. 1980), *cert. denied*, 450 U.S. 925 (1981).

necessarily involuntary.<sup>467</sup> Applying the "clearly erroneous" standard enunciated in *United States v. Parker*,<sup>468</sup> the Ninth Circuit held that the record amply supported the district court's finding that Dufur had understood and waived his right against self-incrimination; thus, he had confessed voluntarily.<sup>469</sup>

### B. *The Right to Counsel*

#### 1. Attachment of the right

The sixth amendment right to assistance of counsel<sup>470</sup> is made applicable to the states by the due process clause of the fourteenth amendment.<sup>471</sup> *Kirby v. Illinois*<sup>472</sup> established that the right of an accused to assistance of counsel attaches only upon the initiation of adversary judicial proceedings, whether by way of indictment, information, arraignment, or preliminary hearing.<sup>473</sup>

The Supreme Court recently held, in *Estelle v. Smith*,<sup>474</sup> that a defendant has a right to assistance of counsel before submitting to a court-ordered pretrial psychiatric interview.<sup>475</sup> Smith had been indicted and an attorney was appointed to represent him prior to the psychiatric interview.<sup>476</sup> Following Smith's conviction for murder, a separate sentencing proceeding was held pursuant to Texas law to determine whether the death sentence could be imposed.<sup>477</sup> The psychiatrist who had performed the pretrial competency examination was allowed to testify over defense counsel's objection.<sup>478</sup>

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467. *Id.* at 513.

468. 549 F.2d 1217, 1220 (9th Cir. 1977) (trial court's determination of voluntariness of confession disturbed only if "plainly untenable").

469. 648 F.2d at 514. *See also* *United States v. Benedict*, 647 F.2d 928, 931 (9th Cir. 1981) (confession to heroin smuggling conspiracy voluntary; not coerced or enticed by alleged prospective use of foreign statute permitting sentence reduction).

470. U.S. CONST. amend. VI.

471. *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963).

472. 406 U.S. 682 (1972).

473. *Id.* at 688-89.

474. 451 U.S. 454 (1981).

475. *Id.* at 470-71.

476. *Id.* at 469. Because Smith had been charged with murder, a capital offense, the trial judge ordered Smith to submit to a pretrial psychiatric examination to determine his competency to stand trial. Smith was determined to be competent to stand trial.

477. *Id.* at 456-58. TEX. CRIM. PROC. CODE ANN. art. 37.071(a) (Vernon 1981) provides in pertinent part: "Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment."

478. *Id.* at 459. The defense objected to the testimony because the psychiatrist's name did not appear on the list of witnesses the State planned to use at either the guilt or penalty stages of the proceedings as was required by a court order issued during the trial.

The Supreme Court affirmed the lower court's decision to vacate the death sentence based on the sixth amendment violation.<sup>479</sup> Chief Justice Burger, writing for the majority, indicated that the defendant's right to counsel had attached at the time of indictment, prior to the pretrial psychiatric examination.<sup>480</sup> A denial of assistance of counsel occurred when the defendant's attorneys were not notified in advance that the psychiatric examination would encompass the issue of their client's future danger to society.<sup>481</sup> The Court concluded that the right to counsel is abridged when a defendant is not given an opportunity to consult with counsel before submitting to a psychiatric examination.<sup>482</sup>

The Court's opinion in *Estelle* placed particular emphasis on the role skilled legal advice plays in allowing a defendant to make a decision which may have subtle implications.<sup>483</sup> Accordingly, the Court observed that a denial of counsel may effectively deny fifth amendment privileges to a defendant who is unaware of his or her right against self-incrimination.<sup>484</sup>

The Ninth Circuit recently reiterated the *Kirby* rule in *United*

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479. *Id.* at 473. The decision to vacate the death sentence was also based on the fifth amendment because the defendant was not informed of his privilege against self-incrimination during the pre-trial competency examination. *Id.* at 469.

480. *Id.* at 469-70.

481. *Id.* at 470-71. The Court limited its decision to the right of a defendant to consult with counsel prior to a psychiatric interview; it did not declare the right of a defendant to have counsel present during the examination. *Id.* at 470 n.14.

482. *Id.* at 470-71. In support of its conclusion, the Court quoted *United States v. Wade*, 388 U.S. 218 (1967):

It is central to [the sixth amendment] principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.

*Id.* at 226-27 (footnote omitted).

483. 451 U.S. at 471. The lower court noted that the decision whether to submit to psychiatric evaluation is " 'literally a life or death matter' and is 'difficult . . . even for an attorney' because it requires 'a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, [and] of possible alternative strategies at the sentencing hearing.' " *Id.* (quoting *Estelle v. Smith*, 602 F.2d 694, 708 (5th Cir. 1979)).

484. *Id.* (citing *Maness v. Myers*, 419 U.S. 449, 466 (1975)). Justices Brennan and Marshall joined in the Court's fifth and sixth amendment analysis while adhering to their view that the death penalty is cruel and unusual punishment prohibited by the eighth and fourteenth amendments. 451 U.S. at 474 (Brennan, J., concurring); *id.* (Marshall, J., concurring). The concurring opinion of Justice Stewart, in which Justice Powell joined, stated that *Masiah v. United States*, 377 U.S. 201 (1964), and *Brewer v. Williams*, 430 U.S. 387 (1977), bar the introduction of the psychiatrist's testimony at any stage of the defendant's trial. *Id.* (Stewart, J., concurring). Justice Rehnquist also joined in the Court's sixth amendment analysis, although he found the Court's fifth amendment argument to be inapplicable to the facts of the case. 451 U.S. at 475-76 (Rehnquist, J., concurring).

*States v. Kenny*.<sup>485</sup> Kenny argued that the Government should have notified defense counsel prior to the initiation of questioning.<sup>486</sup> A telephone conversation between the defendant and a Government agent, containing several damaging admissions by Kenny, had been recorded by the Government.<sup>487</sup> Kenny, however, had not been charged, arrested, or indicted at the time of the recording.<sup>488</sup>

Relying upon *Kirby*, the Ninth Circuit held that Kenny had no right to counsel because adversary proceedings had not yet commenced.<sup>489</sup> The court reasoned that a contrary holding would severely cripple undercover techniques used in criminal investigations.<sup>490</sup>

The Ninth Circuit arrived at a similar conclusion in *United States v. Mills*,<sup>491</sup> in which the sixth amendment rights of prison inmates were called into question. The two inmates in *Mills* were segregated from the rest of the prison population following their implication in the stabbing death of a fellow inmate.<sup>492</sup> Until indictment for murder seven months later, the inmates remained in segregated confinement, they were subjected to curtailed prisoner privileges, and they were unable to obtain legal advice regarding the potential criminal case the Government might pursue.<sup>493</sup>

The trial court dismissed the indictments based both on the Government's failure to justify its delay in bringing the indictments and on the prejudice the defendants may have suffered while confined in isolation for eight months without the assistance of counsel.<sup>494</sup> The trial court concluded that the defendants had been irreparably prejudiced as a result of "the dimming of memories of exonerating witnesses, the loss of witnesses and the deterioration of physical evidence."<sup>495</sup>

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485. 645 F.2d 1323 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981).

486. *Id.* at 1338.

487. *Id.* at 1337-38.

488. *Id.*

489. *Id.* at 1338.

490. *Id.* The court indicated that criminals might be encouraged to obtain "house counsel" who would have to be informed of the Government's intention to use informants in the investigation of their clients. *Id.*

491. 641 F.2d 785 (9th Cir.), *cert. denied*, 454 U.S. 902 (1981).

492. *Id.* at 786.

493. *Id.* at 786-87. The inmates were kept in segregated confinement for a total of eight months. During the course of the disciplinary proceedings, which occurred in the first few weeks of this confinement, the inmates' request to consult with an attorney was denied. *Id.* at 787. The inmates were not permitted to communicate with prisoners outside the segregation area, to discuss their case with anyone except prison officials, or to be examined by their own experts. *Id.* at 786-87.

494. *Id.* (citing *Mills*, 641 F.2d at 787).

495. *Id.*

The Ninth Circuit reversed the district court's order dismissing the indictments,<sup>496</sup> ruling that the defendants had not been deprived of their sixth amendment right to counsel during the pre-indictment period.<sup>497</sup> The court determined that the defendants had not been subject to adversary proceedings until they were indicted; therefore, they were not entitled to the right to counsel until that time.<sup>498</sup>

The concurring opinion noted the "unquestionably troubling" facts of this case and stressed that the constitutional rights of inmates are not to be ignored.<sup>499</sup> Specifically, it stated that "[t]he government cannot brazenly disregard prisoners' constitutional rights when preparing a criminal case against an inmate."<sup>500</sup> The concurring opinion emphasized, however, that the decision to reverse was based only upon the lower court's dismissal of the indictment and did not prevent the defendants from raising any constitutional claims at trial.<sup>501</sup>

## 2. The right to appointed counsel

The Supreme Court first recognized an indigent defendant's constitutional right to the assistance of court-appointed counsel in *Powell v. Alabama*.<sup>502</sup> In *Johnson v. Zerbst*,<sup>503</sup> the Court held that the sixth amendment requires the appointment of counsel for all indigent defendants in federal felony trials.<sup>504</sup> In *Betts v. Brady*,<sup>505</sup> however, the Court declared that the appointment of counsel was not required in every state proceeding because assistance of counsel was not deemed a fundamental right.<sup>506</sup>

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496. *Id.* at 786.

497. *Id.* at 788.

498. *Id.* The court apparently took the position that while the defendants were being disciplined for the role they played in the victim's murder, they were not as yet "accused." See *id.* (citing *Kirby*, 406 U.S. at 689; *United States v. Zazzara*, 626 F.2d 135, 138 (9th Cir. 1980)).

499. *Id.* at 790 (Nelson, J., concurring).

500. *Id.*

501. *Id.* The concurring opinion noted that the defendants' claim "goes to the heart of a defendant's constitutionally protected right to defend himself at trial." *Id.*

502. 287 U.S. 45, 71 (1932). *Powell* involved indigent defendants who were accused of a capital crime. The Court carefully limited the decision to capital cases in which the defendant was incapable of adequately making his own defense "because of ignorance, feeble mindedness, illiteracy or the like." *Id.* The Court concluded that the appointment of counsel to assist the indigent was a logical corollary of the right to a fair hearing. *Id.* at 72.

503. 304 U.S. 458 (1938).

504. *Id.* at 467.

505. 316 U.S. 455 (1942).

506. *Id.* at 471. The *Betts* Court advocated a case-by-case analysis to determine whether a particular court's refusal to appoint counsel amounted to a denial of fundamental fairness. *Id.* at 462.



The analysis of the *Betts* Court was overruled in *Gideon v. Wainwright*,<sup>507</sup> where the Court determined that in felony cases, the fourteenth amendment fully incorporates the sixth amendment right requiring that indigent defendants be provided with appointed counsel.<sup>508</sup> Finally, in *Argersinger v. Hamlin*,<sup>509</sup> the Court extended the right to court-appointed counsel beyond felony cases, stating that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."<sup>510</sup>

Judicial interpretations of constitutional requirements have also been supplemented by various federal statutes which require the appointment of counsel for an indigent defendant.<sup>511</sup> Recently, the Ninth Circuit interpreted the provisions of one such statute which required the appointment of two attorneys in capital cases. In *United States v. Dufur*,<sup>512</sup> the court addressed the issue of whether the invalidation of the death penalty provision in a federal murder statute<sup>513</sup> invalidated the defendant's right to two attorneys in a prosecution for a capital crime.<sup>514</sup> The case involved the fatal shooting of a customs inspector who had attempted to search the defendant at the Canadian border. Dufur contended on appeal that the district court erred in refusing to appoint a second attorney as required by 18 U.S.C. section 3005.<sup>515</sup>

The Ninth Circuit upheld the lower court's determination that the invalidation of the death penalty eliminated the statutory right to a second court-appointed attorney.<sup>516</sup> After citing other circuit court decisions on the issue,<sup>517</sup> the court directed its inquiry to the legislative

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507. 372 U.S. 335 (1963).

508. *Id.* at 342-45.

509. 407 U.S. 25 (1972).

510. *Id.* at 37. In *Argersinger*, the defendant had been sentenced to a prison term. The Court reserved judgment, however, on whether the right to appointment of counsel attaches when no loss of liberty is involved. *Id.*

511. *E.g.*, 18 U.S.C. § 3006A (1976).

512. 648 F.2d 512 (9th Cir. 1980).

513. 18 U.S.C. § 1111 (1976) (providing death penalty in federal prosecutions).

514. 648 F.2d at 514 (citing *Furman v. Georgia*, 408 U.S. 238, 256-57 (1972) (death penalty provision of 18 U.S.C. § 1111 held unconstitutional)).

515. 648 F.2d at 514. 18 U.S.C. § 3005 (1976) grants defendants accused of capital crimes the right to two appointed attorneys.

516. 648 F.2d at 515.

517. *Id.* at 514 (citing *United States v. Shepherd*, 576 F.2d 719, 729 (7th Cir.) (two-counsel provision inapplicable when there was no possibility that the death penalty could be imposed), *cert. denied*, 439 U.S. 852 (1978); *United States v. Weddell*, 567 F.2d 767, 770-71 (8th Cir.) (defendant not entitled to two attorneys), *cert. denied*, 436 U.S. 919 (1977); *United States v. Watson*, 496 F.2d 1125, 1130 (4th Cir. 1973) (defendant entitled to two attorneys despite invalidity of death penalty)).

purpose underlying the dual attorney requirement. The requirement was an attempt to "reduce the chance that an innocent defendant would be put to death because of inadvertence or errors in judgment of his counsel."<sup>518</sup> The court reasoned that because Congress was concerned with the severity of the punishment rather than the nature of the offense,<sup>519</sup> the elimination of a severe and irreversible punishment correspondingly eliminated the necessity of an additional court-appointed counsel.<sup>520</sup>

### 3. Effective assistance of counsel

The constitutional right to counsel is founded upon the assumption that counsel will effectively assist the accused.<sup>521</sup> Counsel's deviation from this expectation results in a denial of the defendant's constitutionally protected rights and warrants reversal of a conviction.<sup>522</sup> The Supreme Court, however, has expressly delegated determinations of attorney competence to the trial courts.<sup>523</sup>

The Ninth Circuit standard for attorney competency was established in *Cooper v. Fitzharris*.<sup>524</sup> This standard requires that an accused be afforded a "reasonably competent and effective representation" pursuant to the sixth amendment guarantee.<sup>525</sup> In cases where a denial of effective assistance of counsel is found, the *Cooper* standard requires that specific prejudice be shown before relief will be granted.<sup>526</sup>

During the 1981 term, the Ninth Circuit addressed the issue of effective assistance of counsel in *Satchell v. Cardwell*.<sup>527</sup> Satchell had been convicted in an Arizona state court of kidnapping, rape, aggravated assault, and assault with a deadly weapon.<sup>528</sup> The victim, a fifty-year-old woman, had been abducted and held captive, and was repeat-

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518. 648 F.2d at 515 (quoting *United States v. Shepherd*, 576 F.2d 719, 729 (7th Cir.), cert. denied, 439 U.S. 852 (1978)).

519. 648 F.2d at 515.

520. *Id.*

521. *Powell v. Alabama*, 287 U.S. 45, 56 (1932).

522. *McMann v. Richardson*, 397 U.S. 759, 770-71 (1970).

523. *Id.*

524. 586 F.2d 1325 (9th Cir. 1978) (en banc).

525. *Id.* at 1328.

526. *Id.* at 1331. "When the claim of ineffective assistance of counsel rests upon specific acts or omissions of counsel at trial, . . . relief will be granted only if it appears that the defendant was prejudiced by counsel's conduct." *Id.* at 1331. See also *Ewing v. Williams*, 596 F.2d 391, 394 (9th Cir. 1979) (requiring that lower court make specific findings of prejudice on record). The prior Ninth Circuit standard of attorney incompetence required conduct that resulted in a trial deemed a farce or a mockery of justice. 586 F.2d at 1328.

527. 653 F.2d 408 (1981).

528. *Id.* at 408.

edly raped, stabbed, and beaten for a period of three days.<sup>529</sup> Acting on a tip that the victim was confined in the defendant's trailer and that her life was in danger, a police officer made a limited warrantless entry into the trailer.<sup>530</sup>

The defendant contended that his sixth amendment right to effective assistance of counsel was violated when his attorney failed to make a motion to suppress evidence obtained as a result of the warrantless search.<sup>531</sup> The court, however, found the defendant's argument to be without merit, and it affirmed the district court's denial of his habeas corpus petition.<sup>532</sup>

The court determined that the proper test for Satchell's claim was two-fold: the defendant must first prove that his counsel did not act in a reasonably competent and effective manner; second, that the incompetence was prejudicial to the defense.<sup>533</sup>

The court found that Satchell had failed to show initially that his attorney had not acted as a reasonably competent criminal defense attorney.<sup>534</sup> The court made a thorough inquiry into the defendant's fourth amendment claim,<sup>535</sup> and decided that even if the close question of the existence of probable cause could not be answered affirmatively,<sup>536</sup> the exigent circumstances involving the victim's safety justified the limited entry.<sup>537</sup> Thus, the court found it unnecessary to apply

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529. *Id.*

530. *Id.* at 408-09. The evidence indicated that the officer, hearing voices inside the trailer, knocked on the door. Although the defendant opened the door only a few inches, the officer opened the door the rest of the way in order to see the victim, who was clearly injured. The officer then entered the trailer and questioned the victim prior to conducting a more thorough search and arresting the defendant. *Id.* at 409.

531. *Id.* at 408.

532. *Id.* at 414.

533. *Id.* at 409 (citing *Cooper v. Fitzharris*, 586 F.2d at 1327; *Ewing v. Williams*, 596 F.2d at 394).

534. 653 F.2d at 409-10. The court noted that "[a]lthough a suppression motion might have been successful, the issue was so close that it cannot be said that a reasonably competent attorney could not have failed to make such a motion. That failure in the context of his attorney's other aggressive actions on Satchell's behalf, did not deprive Satchell of competent representation." *Id.* at 410 (footnote omitted).

535. *Id.* at 410-13. The court found that the facts of the case made it unnecessary to inquire whether its examination of a sixth amendment claim grounded upon a fourth amendment violation was barred by *Stone v. Powell*, 428 U.S. 465 (1976). 653 F.2d at 409 n.6. In *Stone*, the Court concluded that federal habeas corpus relief should not be granted to a prisoner when the state has provided an opportunity for the full litigation of a fourth amendment claim. 428 U.S. at 494.

536. 653 F.2d at 411.

537. *Id.* at 411-13. The court reasoned that a combination of factors may have justified the warrantless search. These factors included corroboration of the tip, suspicious actions of the defendant, and the clear potential for a life threatening situation. *Id.* at 411.

the second part of the test, *i.e.*, whether under *Cooper*, the defendant had been prejudiced by the ineffective assistance of counsel.<sup>538</sup>

The *Satchell* court stressed that the decision to uphold the state court's findings of fact as to the attorney's competence was required by the habeas corpus statute,<sup>539</sup> unless the state court's findings were unsupported by the record.<sup>540</sup> The court's deference to the state court's findings in this case was supported by the transcripts of both the trial and the post-conviction hearing.<sup>541</sup> The judge who presided over both of these proceedings made special inquiries into the attorney's failure to make a motion to suppress.<sup>542</sup> The judge's findings indicated that the representation of the defendant was commendable under the circumstances and that the defendant was not prejudiced by his attorney's failure to make a motion to suppress.<sup>543</sup> The district court gave these findings a presumption of correctness after the Arizona Supreme Court denied review of the case.<sup>544</sup>

The analysis in *Satchell* was based primarily on a review of the defendant's fourth amendment claim. While this approach may appear necessary to determine counsel's effective defense of a defendant's fourth amendment rights, it effectively transposed a sixth amendment claim into a fourth amendment case. The concurring opinion observed that this approach should be used with caution and only when absolutely necessary.<sup>545</sup> Both opinions emphasized that a reviewing court considering sixth amendment claims should concentrate upon the attorney's ability to make competent defense decisions, and not upon whether those decisions represent flawless legal conclusions.<sup>546</sup>

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538. *Id.* at 409-10. If the defendant had shown ineffectiveness on the part of his attorney, the burden to show prejudice resulting from his counsel's poor defense would have remained. *Id.* at 409 n.7. In dicta, the court noted that *Satchell* would not have been able to make such a showing, as sufficient testimonial evidence was presented to uphold *Satchell*'s conviction even if the nontestimonial evidence had been suppressed as the result of an illegal entry. *Id.*

539. 28 U.S.C. § 2254(d) (1981).

540. 653 F.2d at 414 (citing *Sumner v. Mata*, 449 U.S. 539, 551 (1981) (indicating that a court granting a writ of habeas corpus should include in its opinion the reasoning which led it to conclude that any of the first seven factors enumerated in 28 U.S.C. § 2254(d) were present, or the reasoning which led the court to conclude that the state court's finding was not fairly supported by the record)).

541. 653 F.2d at 413-14.

542. *Id.*

543. *Id.* at 414.

544. *Id.*

545. *Id.* (Kennedy, J., concurring). The concurring opinion also warned that this approach may be precluded by a future decision on the applicability of *Stone v. Powell*. See *id.* at 409 n.6.

546. *Id.* at 410, 414.

The standard announced in *Cooper* was also applied by the Ninth Circuit in *United States v. Casanova*.<sup>547</sup> Casanova had been convicted of aiding and abetting the robbery of a savings and loan association.<sup>548</sup> On appeal, the defendant asserted that he was denied effective assistance of counsel because his attorney had announced prior to trial that the attorney-client relationship had completely broken down; he failed, however, to make a record of the factual basis for this assertion.<sup>549</sup> The defendant also claimed that his attorney's decision to challenge the adequacy of the Government's evidence identifying the defendant as the perpetrator of the crime, rather than present an affirmative defense based on involuntariness, was indicative of incompetent assistance of counsel.<sup>550</sup>

The court, however, found nothing in the record to establish ineffective assistance of counsel under the *Cooper* standards.<sup>551</sup> It emphasized the trial counsel's apparent familiarity with the facts of the case and the applicable law, and specifically noted that the record did not support the suggestion that the attorney could have made a factual showing of the basis for the communications breakdown.<sup>552</sup> The court also stated that counsel's decision not to present an affirmative defense based on involuntariness was a "reasonable choice among available trial strategies."<sup>553</sup>

A strong dissenting opinion in *Casanova* argued that the defendant's right to effective counsel was violated as a result of the trial court's denial of his motion for substitution of attorney.<sup>554</sup> The dissent pointed out that the record was silent on the subject of a breakdown in the attorney-client relationship only because the trial court refused to grant the defendant's application for a factual hearing on his motion for substitution.<sup>555</sup>

The dissent noted that the denial of a motion to dismiss counsel is a "matter resting within the sound discretion of the trial judge."<sup>556</sup> The dissent argued, however, that a defendant's constitutional right to effective assistance of counsel may be violated if the court refuses to

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547. 642 F.2d 300 (9th Cir.) (per curiam), *cert. denied*, 454 U.S. 899 (1981).

548. *Id.* at 300.

549. *Id.* at 301.

550. *Id.*

551. *Id.*

552. *Id.*

553. *Id.*

554. *Id.* at 301-04 (Alarcon, J., dissenting).

555. *Id.* at 302. The district court denied the appellant's application for a factual hearing on his motion for substitution, concluding that the request was untimely. *Id.*

556. *Id.* (quoting *United States v. Mills*, 597 F.2d 693, 700 (9th Cir. 1979)).

allow a substitution when an irreconcilable conflict exists between the defendant and his attorney.<sup>557</sup>

The dissent relied on the test established in *United States v. Mills*<sup>558</sup> for determining whether a trial court has violated a defendant's right to competent counsel.<sup>559</sup> The *Mills* court announced three factors to be considered in reviewing a lower court's denial of a request to dismiss counsel: (1) the timeliness of the motion for substitution of attorney; (2) the adequacy of the inquiry into the defendant's basis for the motion; and (3) whether the conflict has resulted in a total lack of communication between the defendant and his attorney.<sup>560</sup>

The dissent's application of these factors to the facts in *Casanova*<sup>561</sup> presented a persuasive argument for granting a hearing to determine whether a breakdown had, in fact, occurred in the attorney-client relationship. The opinion noted that the motion for substitution was made in the session of court following counsel's discovery of the breakdown<sup>562</sup> and that the trial court foreclosed any inquiry into the attorney-client relationship by denying defendant's application for a factual hearing on his motion for substitution of counsel.<sup>563</sup> The dissent also observed that information given the lower court by the defendant prior to trial resulted in that court's refusal to accept the defendant's offer to plead guilty.<sup>564</sup> The dissent argued that when it subsequently became apparent that no defense was to be presented, the trial court should have granted a hearing on the breakdown issue.<sup>565</sup>

The majority refused to consider the dissent's analysis, noting that the trial court's compliance with *Mills* was not properly raised on appeal, and the record failed to disclose plain error.<sup>566</sup> The dissent, however, urged that "an appellate court has an affirmative duty to reach an issue not properly raised below, in order to preserve the integrity of the

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557. *Id.*

558. 597 F.2d 693 (9th Cir. 1979).

559. 642 F.2d at 301-02 (Alarcon, J., dissenting).

560. *Id.* at 302-03 (citing *United States v. Mills*, 597 F.2d 693, 700 (9th Cir. 1979)).

561. *Id.* at 302-04.

562. *Id.* at 302.

563. *Id.*

564. *Id.* at 303. The defendant claimed that he was under the influence of a memory suppressant drug and could not recall the events leading to the commission of the robbery and furthermore, that he was unaware that a bank was going to be robbed. *Id.*

565. *Id.*

566. *Id.* at 301 n.1. In response, the dissent argued that on appeal the defendant's opening brief alerted the Ninth Circuit to the fact that prior to trial, counsel had informed the lower court of a complete breakdown in the attorney-client relationship. *Id.* at 303 (Alarcon, J., dissenting).

judicial process, even though the facts may *not* disclose a miscarriage of justice."<sup>567</sup>

The necessity for a factual hearing, as advocated by the dissent, is especially compelling in cases where the defendant has been potentially deprived of the ability to present an effective defense. As the dissent noted, in such cases the defendant is denied the ability even to establish a sufficient record which might indicate the existence of a breakdown in the attorney-client relationship.<sup>568</sup> It is quite possible that the breakdown itself may prevent a reviewing court from being presented with a clear issue. Therefore, it becomes incumbent upon reviewing courts to analyze carefully a defendant's claim, and to order factual hearings in cases where judicial integrity requires further investigation into a claim of ineffective assistance of counsel.

The element of prejudice required by *Cooper* was not demonstrated in *United States v. Mayo*.<sup>569</sup> The defendants in that case had been convicted of mail and securities fraud.<sup>570</sup> One of the defendants claimed that a prison transfer he underwent during his incarceration denied him his sixth amendment right to counsel.<sup>571</sup> The defendant asserted that he had lost some papers in the course of the transfer and that the location of the second prison made conferences with his counsel more difficult.<sup>572</sup> The defendant, however, failed to show how he had been prejudiced by these events, as required by *Cooper*.<sup>573</sup>

Another defendant in *Mayo* argued that the trial court had erred in not giving him an evidentiary hearing regarding the competence of his counsel.<sup>574</sup> The Ninth Circuit observed that this contention might have been found meritorious had the defendant been able to show in the record that choices made by his counsel were the product of inade-

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567. *Id.* at 303-04 (citing *United States v. Licavoli*, 604 F.2d 613, 623 (9th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980)).

568. 642 F.2d at 302 (Alarcon, J., dissenting).

569. 646 F.2d 369 (1981) (*per curiam*).

570. *Id.* at 371.

571. *Id.* at 373.

572. *Id.*

573. *Id.*

574. *Id.* at 374-75. The defendant based his claim of ineffective assistance of counsel on charges that his attorney

was rarely available to confer with him prior to trial; was seldom available during the lengthy trial; refused to subpoena defense witnesses; was absent during the trial; failed to arrange a meeting with other defense counsel; failed to give Mayo a copy of the indictment; failed to discuss his closing argument with Mayo before delivering it; and finally told Mayo that he "just [couldn't] handle [the trial]."

*Id.* (brackets in original).

quate preparation, or had he raised questions of fact in that regard.<sup>575</sup> However, this defendant also was unable to show any prejudice resulting from counsel's conduct.<sup>576</sup> The *Mayo* court concluded that the defendant's allegations amounted to nothing more than a simple difference of opinion with respect to trial tactics, which, standing alone, does not constitute a denial of effective assistance of counsel.

#### 4. Conflict of interest

The sixth amendment right to effective assistance of counsel may be jeopardized when an attorney represents conflicting interests. Courts have been particularly sensitive when the interests of a client have not been pursued single-mindedly. In *Glasser v. United States*,<sup>577</sup> the Supreme Court found that the district court had denied Glasser his sixth amendment right to effective assistance of counsel by requiring an attorney to represent both Glasser and his co-defendant after the court had been advised of the possibility that conflicting interests might arise.<sup>578</sup> In reversing Glasser's conviction, the Court did not inquire whether the prejudice resulting from the conflict was harmless.<sup>579</sup> The Supreme Court refined the issue further in *Holloway v. Arkansas*,<sup>580</sup> by establishing that the lower court will be automatically reversed when a trial judge either fails to appoint separate counsel after the defense counsel has raised the conflict issue, or refuses to conduct an adequate hearing concerning a potential conflict.<sup>581</sup>

In 1980, the Supreme Court in *Cuyler v. Sullivan*<sup>582</sup> narrowed the impact of its prior decisions. The *Sullivan* Court held that in order to establish a violation of the sixth amendment a defendant must prove that an actual conflict of interest adversely affected his/her lawyers' performance.<sup>583</sup> The narrow view presented in *Sullivan* was recently modified in *Wood v. Georgia*.<sup>584</sup> The *Wood* Court imposed an affirma-

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575. *Id.* at 375 (citing *United States v. DeCoster*, 487 F.2d 1197, 1201 (D.C. Cir. 1973)). In *DeCoster*, the court held that "a defendant is entitled to the reasonably competent assistance of an attorney acting as his diligent conscientious advocate." 487 F.2d at 1202 (emphasis in original). If a defendant shows that he has been denied effective representation, the burden of proof to establish lack of prejudice shifts to the Government. *Id.* at 1204.

576. *Id.* at 375.

577. 315 U.S. 60 (1942).

578. *Id.* at 76.

579. *Id.* at 75-76.

580. 435 U.S. 475 (1978).

581. *Id.* at 484, 488.

582. 446 U.S. 335 (1980).

583. *Id.* at 348.

584. 450 U.S. 261 (1981).



tive duty upon courts to inquire into a possible conflict of interest when it becomes apparent that a conflict might exist.<sup>585</sup>

In *Wood*, former employees of an "adult" movie theater and book store had been convicted of distributing obscene materials.<sup>586</sup> The defendants received probation on the condition that they make monthly payments towards the satisfaction of their fines.<sup>587</sup> When the defendants failed to make the payments, a probation revocation hearing was held, and the defendants were sentenced to serve the remaining portions of their sentences.<sup>588</sup> The Supreme Court granted certiorari to determine whether the equal protection clause allowed the imposition of imprisonment for failure to make installment payments on fines.<sup>589</sup> However, the Court declined to address the equal protection question and instead analyzed the case in terms of due process.<sup>590</sup> From the facts, the Court found a clear possibility of a conflict of interest.<sup>591</sup>

The defendants in *Wood* had been represented by an attorney who was compensated by the defendants' former employer.<sup>592</sup> The defendants' employment contract provided for such representation and also stated that the employer would pay any fines and post necessary bonds.<sup>593</sup> The employer, however, failed to pay the fines, which resulted in the defendants' confinement.<sup>594</sup>

Justice Powell, writing for the majority, surmised that the employer may have declined to pay the fines in an attempt to litigate the equal protection issue concerning confinement for failure to pay fines.<sup>595</sup> The Court further noted that although it was uncertain that the employer was motivated by a desire for a test case, there were sufficient indications from the record to suggest that a conflict of interest may have existed.<sup>596</sup> The Court concluded that the potential for injustice was sufficient to require a determination of whether the defendants

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585. *Id.* at 272.

586. *Id.* at 263.

587. *Id.*

588. *Id.* at 264.

589. *Id.*

590. *Id.* at 264-65.

591. *Id.* at 267.

592. *Id.* at 266.

593. *Id.*

594. *Id.* at 267.

595. *Id.* The Court found that the defendants' employer was substantially involved in the litigation. *Id.* at 266 n.9.

596. *Id.* at 267. The Court noted that due process protections apply to probation revocations. *Id.* at 271 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 480-82 (1972)).

had been deprived of their rights under the due process clause of the fourteenth amendment.<sup>597</sup>

The *Wood* Court recognized that reversal is required when the trial court has failed to inquire into a possible conflict of interest even though it " 'knows or reasonably should know that a particular conflict exists.' " <sup>598</sup> The majority noted that the defense counsel had sought to present a constitutional argument rather than advocate leniency.<sup>599</sup> The Court observed that the leniency argument might have resulted in substantial reductions in, or deferrals of, the fines, thereby preventing the defendants' eventual imprisonment.<sup>600</sup> Accordingly, the Court vacated and remanded for a hearing to determine whether a conflict of interest existed at the time of the probation revocation.<sup>601</sup>

In dissent, Justice White asserted that the Court lacked jurisdiction to review the due process question, because it was never raised in state court.<sup>602</sup> Therefore, Justice White found the equal protection question to be the only issue properly before the Court.<sup>603</sup> Justice White criticized the majority's assumption that a conflict of interest existed, and he suggested possible alternative explanations for the employer's failure to pay the fines.<sup>604</sup>

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597. 450 U.S. at 271.

598. *Id.* at 272 n.18 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980)).

599. 450 U.S. at 272.

600. *Id.* The majority opinion in *Wood* was joined by Justice Stevens who found it unnecessary to hypothesize on the possibility that the employer was interested in setting up a test case. *Id.* at 274 (Stevens, J., concurring). Rather, Justice Stevens found that independent counsel would have made arguments to prevent the imposition of the high fines which the defendants were clearly unable to pay in the absence of an enforceable commitment from the employer. *Id.* He concluded that the judgment should be vacated because of "the likelihood that the state trial court would have imposed a significantly different sentence if it had not been led to believe that the employer would pay the fines." *Id.*

In separate opinions, Justices Brennan and Stewart also concurred in the Court's decision with regard to the clear possibility of a conflict of interest. *Id.* at 274-75 (Brennan, J., and Stewart, J., concurring in part). However, both Justices felt that the conviction should have been reversed on the ground that the state obscenity statute was facially unconstitutional. *Id.* at 275 (Brennan, J., and Stewart, J., dissenting in part).

601. *Id.* at 273.

602. *Id.* at 277 (White, J., dissenting) (citing *Moore v. Illinois*, 408 U.S. 786, 799 (1972); *Hill v. California*, 401 U.S. 797, 805 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 438-39 (1969)).

603. 450 U.S. at 279 (White, J., dissenting). Justice White believed that the equal protection issue should have been decided in favor of the defendants. *Id.* at 287. He noted that "the 'Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent.'" *Id.* (quoting *Tate v. Short*, 401 U.S. 395, 398 (1971)).

604. 450 U.S. at 282 (White, J., dissenting). Justice White pointed out that despite an appeal the employer would have been liable for any fines if the obligations contained in the employment contract had been enforceable. *Id.* He also suggested that the employer may

The dissenting opinion, however, failed to acknowledge the unique nature of issues involving conflicts of interest. Often the very existence of the conflict itself prevents the issue from being raised in court proceedings.<sup>605</sup> Thus, the courts must remain sensitive to situations which may indicate the possibility of a conflict. The majority opinion in *Wood* properly characterized this judicial responsibility as necessary to protect the interests of the accused and to insure the fundamental fairness of the judicial system.<sup>606</sup>

In *Bryan v. United States*,<sup>607</sup> the Ninth Circuit considered the type of conflict required for reversal. The defendant alleged that his counsel's prior representation of a Government witness established a conflict of interest.<sup>608</sup> The defendant's attorney was a member of a law firm which had represented the witness in another matter.<sup>609</sup> At the defendant's suppression hearing, the witness failed to disclose the content of a conversation with the defendant's attorney regarding a motion for suppression of the evidence, and the attorney took the stand to testify to the substance of the conversation.<sup>610</sup>

The court relied on *Sullivan*<sup>611</sup> in ruling that "a defendant who raise[s] no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance."<sup>612</sup> The record indicated that the defendant's attorney had made vigorous efforts to cross-examine the witness and then subsequently took the stand to tes-

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have reneged on his promise to pay the fines because the defendants were no longer working for the employer. *Id.* Justice White concluded that if the employer had merely been unwilling to pay the fines, then the equal protection argument advanced by the defendants' attorney may have been the best argument available. *Id.* at 283.

605. See *id.* at 265 n.5. The majority opinion discussed the propriety of its consideration of the conflict of interest issue in a direct response to the assertions made by Justice White. The Court indicated that the appeal and the petition for certiorari had been prepared by the attorney involved in the alleged conflict. *Id.* The State's attorney could only be expected to call the matter to the court's attention, and it is doubtful that the defendants were capable of raising the conflicts issue on their own. *Id.* Under such circumstances, the Court concluded that the interests of justice required consideration of the issue, regardless of whether the question was technically raised in the lower courts. *Id.*

606. *Id.* at 270-71.

607. 645 F.2d 842 (9th Cir.), *cert. denied*, 454 U.S. 1126 (1981).

608. *Id.* at 842-43.

609. *Id.*

610. *Id.* at 843. The defendant contended that counsel may have been in possession of privileged information regarding the witness and that the witness still owed legal fees. This state of affairs, argued defendant, adversely affected counsel's ability to cross-examine the witness. *Id.*

611. 446 U.S. 335 (1980).

612. 645 F.2d at 843 (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980)).

tify in direct opposition to the witness' testimony.<sup>613</sup> The court concluded that the attorney's efforts during cross-examination of the witness conclusively established the absence of any conflict of interest.<sup>614</sup>

The *Bryan* court factually distinguished *Wood*. The court stated that in *Wood* "the record strongly suggested that actual conflict existed at the time of trial."<sup>615</sup> In *Bryan*, however, the defendant had neglected to show how the attorney's cross-examination might have been improved.<sup>616</sup> The court concluded that the defendant's allegation of conflict was "wholly without merit."<sup>617</sup>

The dissent in *Bryan* determined that the case should have been reversed and remanded for an evidentiary hearing on the merit of the defendant's allegations.<sup>618</sup> Such a result would require a hearing whenever the possibility of a conflict is found. Although recent decisions establish heightened judicial awareness of conflicts of interest, a general automatic reversal rule has yet to be accepted.<sup>619</sup>

While the dissenting opinion's sensitivity to the defendant's conflict of interest claim is commendable, the need for an evidentiary hearing in *Bryan* was completely unsupported by the record.<sup>620</sup> Moreover, the interest in judicial economy would seem to justifiably override any competing interest in investigating unsubstantiated claims of prejudice. The Supreme Court's ruling in *Wood* strikes a reasonable balance be-

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613. 645 F.2d at 843.

614. *Id.*

615. *Id.* (citing *United States v. Hearst*, 638 F.2d 1190 (9th Cir. 1980)). In *Hearst*, the defendant claimed that a book contract with her attorney concerning the subject matter of her defense created a conflict of interest which denied her the right to effective assistance of counsel. *Id.* at 1193. The *Hearst* court ruled that the standard is whether the claimant has "stated a claim on which relief could be granted." *Id.* at 1194 (quoting *Moore v. United States*, 571 F.2d 179, 184 (3d Cir. 1978)). The court found that *Hearst* had sufficiently alleged an actual conflict and had effectively shown an adverse effect. 638 F.2d at 1195.

616. 645 F.2d at 843.

617. *Id.*

618. *Id.* at 843-44 (Fletcher, J., dissenting).

619. The *Wood* decision requires that the record reveal some possibility of a conflict of interest. 450 U.S. at 272.

620. See 645 F.2d at 843. The dissent conceded that the defendant's allegations were unspecified and general; nevertheless, it advocated allowing the defendant an opportunity to establish more specific grounds on the basis of facts presented at the requested evidentiary hearing. *Id.* at 844 (Fletcher, J., dissenting). The defendant's allegations regarding counsel's inability to cross-examine the witness were, however, specifically refuted by the record's documentation of counsel's extraordinary efforts to elicit testimony on behalf of the defendant. *Id.* at 843. Thus, the defendant's conflict of interest claim lacked even potential grounds on which an evidentiary hearing might have been based.

tween the protection of a defendant's sixth amendment rights and the needs of judicial economy.

In *United States v. Halbert*,<sup>621</sup> the Ninth Circuit again denied the defendant relief because the record did not reveal a conflict of interest.<sup>622</sup> Halbert had been convicted of mail fraud stemming from a scheme to market items commemorating the nation's bicentennial celebration.<sup>623</sup> He contended that his attorney's representation of a co-defendant at the arraignment resulted in prejudicial error.<sup>624</sup>

Rejecting Halbert's argument, the court stated that "[r]eversal is required only when the defendant meets the burden of showing specific prejudice to his rights by the multiple representation."<sup>625</sup> The court emphasized the Ninth Circuit's rejection of "a *per se* rule requiring reversal of a criminal conviction because of a potential conflict of interest deriving from multiple representation of co-defendants in criminal trials."<sup>626</sup>

Halbert, however, contended that the implication of a potential conflict requires reversal of a conviction under *Holloway v. Arkansas*.<sup>627</sup> The Ninth Circuit found Halbert's contention without merit. The court distinguished *Holloway* because in that case the multiple representation had been forced on the defendants over the objections of counsel,<sup>628</sup> whereas in *Halbert*, the defendant's attorney had agreed to the representation of the co-defendant, and the co-defendant had also approved the arrangement.<sup>629</sup>

The Ninth Circuit's decision in *Halbert* underscores the trend towards requiring that a defendant demonstrate "actual and substantial

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621. 640 F.2d 1000 (9th Cir. 1981).

622. *Id.* at 1010.

623. *Id.* at 1003-04.

624. *Id.* at 1010.

625. *Id.* (citing *Willis v. United States*, 614 F.2d 1200, 1202-04 (9th Cir. 1979); *United States v. Kutas*, 542 F.2d 527, 529 (9th Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977); *United States v. Nystrom*, 447 F.2d 1350, 1351 (9th Cir.), *cert. denied*, 404 U.S. 993 (1971); *Davidson v. Cupp*, 446 F.2d 642, 643 (9th Cir. 1971)).

626. 640 F.2d at 1010 (citing *Willis v. United States*, 614 F.2d 1200, 1202 (9th Cir. 1979); *United States v. Eaglin*, 571 F.2d 1069, 1086 (9th Cir. 1977), *cert. denied*, 435 U.S. 906 (1978); *Watkins v. Wilson*, 408 F.2d 351, 352 (9th Cir. 1969); *Glavin v. United States*, 396 F.2d 725, 727 (9th Cir.), *cert. denied*, 393 U.S. 926 (1968).

627. 640 F.2d at 1010 (citing *Holloway v. Arkansas*, 435 U.S. 475 (1978)). See *supra* text accompanying notes 580 & 581.

628. 640 F.2d at 1010.

629. *Id.* The court's reasoning implies that the Ninth Circuit requires that multiple representation be forced on unwilling defendants in order to invoke a *per se* rule requiring reversal.

prejudice" as a result of violations of his right to counsel.<sup>630</sup> A defendant, therefore, is required to show through objective evidence that an actual conflict of interest exists. This rule ignores the sweeping language of the Supreme Court in *Holloway*, which seems directed towards potential conflicts of interest and the automatic reversal of cases in which effective assistance of counsel has been denied.<sup>631</sup>

While the Ninth Circuit's requirement of a showing of prejudice may impact potential cases of conflict which lack supporting evidence, it seems unlikely that Halbert's conviction would have been reversed even in the absence of a prejudice requirement. Halbert's claim was based on multiple representation which occurred only during the defendant's arraignment; any potential for conflict was thus effectively eliminated as the representation was limited solely to the taking of a plea.<sup>632</sup> Because Halbert failed to demonstrate any potential conflict of interest, further investigation which might have been warranted under different circumstances was properly denied.

##### 5. Interference with the attorney-client relationship

Once adversary judicial proceedings have commenced against an accused and the corresponding constitutional right to counsel has attached, any government interference with the attorney-client relationship may be deemed a violation of the sixth amendment.<sup>633</sup> In *Massiah v. United States*,<sup>634</sup> the Supreme Court found that the defendant had been denied the basic protections of the sixth amendment guarantee when, after he had been indicted, the government deliberately elicited incriminating evidence from him in the absence of counsel, and used it against him at trial.<sup>635</sup> The Court held that such statements were inadmissible.<sup>636</sup>

In *United States v. Henry*,<sup>637</sup> a Government informant testified at trial to conversations held with the defendant.<sup>638</sup> The informant, an inmate who shared defendant Henry's jail cell, had been instructed to

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630. *See id.*

631. *See Holloway v. Arkansas*, 435 U.S. 475, 484 (1978). *See also Chapman v. California*, 386 U.S. 18, 21-22 (1967); *Glasser v. United States*, 315 U.S. 60, 76 (1942).

632. 640 F.2d at 1010.

633. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972).

634. 377 U.S. 201 (1964).

635. *Id.* at 206.

636. *Id.* at 207.

637. 447 U.S. 264 (1980).

638. *Id.* at 267.

"pay attention to the information furnished by Henry."<sup>639</sup> The informant was to be paid only if he secured incriminating information; furthermore, the Government knew that the custodial environment was apt to facilitate a relationship of trust between persons sharing a common plight.<sup>640</sup> The Court found that under these circumstances the informant's conduct was attributable to the Government<sup>641</sup> and held that the statements should not have been admitted at trial.<sup>642</sup>

In 1981, the Supreme Court considered the remedial aspects of a sixth amendment violation in *United States v. Morrison*.<sup>643</sup> Morrison had been indicted on two counts of distributing heroin and had retained private counsel.<sup>644</sup> Federal agents seeking to obtain her cooperation in a related investigation met with Morrison on two occasions without her counsel's knowledge or permission.<sup>645</sup>

On their first visit the agents disparaged Morrison's counsel and indicated that Morrison would gain various benefits if she cooperated and would face a stiff jail term if she refused.<sup>646</sup> Morrison did refuse to cooperate, however, and subsequently notified her attorney of the meeting.<sup>647</sup> The agents' second meeting with Morrison was also conducted in the absence of counsel and once again she refused to cooperate or incriminate herself.<sup>648</sup>

The district court denied Morrison's motion to dismiss the indictment with prejudice.<sup>649</sup> The motion, which asserted sixth amendment violations by the federal agents, contained no allegations that the agents' conduct had adversely affected her legal position.<sup>650</sup> Rather, the motion alleged merely that the agents' behavior had interfered with the defendant's right to counsel.<sup>651</sup> The Third Circuit reversed, finding that dismissal of the indictment was the appropriate remedy despite the absence of any negative effect on the defendant's representation.<sup>652</sup>

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639. *Id.* at 271 n.8. The Court noted that the informant "remained free to discharge his task of eliciting the statements in myriad less direct ways." *Id.*

640. *Id.* at 270.

641. *Id.* at 271.

642. *Id.* at 274.

643. 449 U.S. 361 (1981).

644. *Id.* at 362.

645. *Id.*

646. *Id.*

647. *Id.* at 362-63.

648. *Id.*

649. *Id.* at 363.

650. *Id.*

651. *Id.*

652. *Id.*

A unanimous Supreme Court held that dismissal of an indictment is inappropriate when a sixth amendment violation has had no adverse impact on a criminal proceeding.<sup>653</sup> The Court stated:

At the same time and without detracting from the fundamental importance of the right to counsel in criminal cases, we have implicitly recognized the necessity for preserving society's interest in the administration of criminal justice. Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not necessarily infringe on competing interests.<sup>654</sup>

Thus, even in cases of deliberate sixth amendment violations<sup>655</sup> the defendant must demonstrate either actual prejudice or a substantial threat thereof.<sup>656</sup> Because the defendant in *Morrison* made no showing of prejudicial impact, no interference with the criminal proceeding was justified<sup>657</sup> and it could "go forward with full recognition of the defendant's right to counsel and to a fair trial."<sup>658</sup>

Several weeks after the Supreme Court's decision in *Morrison*, the Ninth Circuit decided *United States v. Bagley*.<sup>659</sup> In *Bagley*, the defendant argued that the Government's use of an informant who shared his jail cell to elicit information from the defendant violated *Massiah*

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653. *Id.* at 366-67.

654. *Id.* at 364 (citing *Geders v. United States*, 425 U.S. 80, 91 (1976) (order directing defendant not to consult with attorney during a 17-hour overnight recess falling between direct examination and cross-examination of defendant held invalid); *Herring v. New York*, 422 U.S. 853, 865 (1975) (state statute giving judge in bench trial authority to deny defense counsel closing argument held invalid); *O'Brien v. United States*, 386 U.S. 345, 345 (1967) (violation resulting from improper intrusion on pretrial attorney-client conversations); *Black v. United States*, 385 U.S. 26, 26-29 (1967) (law enforcement officers improperly overheard conversations between defendant and attorney); *Gideon v. Wainwright*, 372 U.S. 335, 337, 345 (1963) (defendant denied assistance of counsel at criminal trial on the ground that state law permitted counsel appointed for indigent defendants in capital cases only)).

The Court noted that none of the cases cited resulted in the dismissal of an indictment. 449 U.S. at 365. Rather, the appropriate remedy is to suppress evidence unconstitutionally obtained, or if evidence has been wrongfully admitted, to order a new trial. *Id.* Moreover, certain sixth amendment violations may be disregarded as harmless error. *Id.* (citing *Chapman v. California*, 386 U.S. 18, 23 (1967) (constitutional error harmless where State proves beyond reasonable doubt that error did not contribute to verdict)).

655. The *Morrison* Court termed the behavior of the government agents "egregious." 449 U.S. at 367.

656. 449 U.S. at 365.

657. *Id.* at 366. "[T]here being no claim of any discernible taint, even the traditional remedies were beside the point." *Id.* at 365-66 n.2.

658. *Id.* at 365.

659. 641 F.2d 1235 (9th Cir. 1981).



and *Henry*.<sup>660</sup> The court, however, ruled that absent a showing of prejudice, defendant's sixth amendment claim did not warrant relief.<sup>661</sup> The court reviewed the record and concluded that the use of the informant did not result in the introduction of any prejudicial evidence against the defendant at trial.<sup>662</sup> The informant provided only a limited amount of information and Government prosecutors made efforts to insulate themselves from any information passed by the informant to the investigative agents.<sup>663</sup>

The *Bagley* court distinguished *Henry* on the ground that the informant in *Henry* testified against the defendant at trial, and thus the prejudice was readily apparent.<sup>664</sup> As the concurring opinion in *Bagley* pointed out, such a situation requires no showing of prejudice and under *Massiah* the evidence must be excluded.<sup>665</sup> It is only when no evidence obtained from an informant has been used at trial that the defendant has the burden of demonstrating prejudice.<sup>666</sup>

The practical effect of the *Bagley* court's analysis is to place an additional burden upon a defendant in proving sixth amendment violations. Arguably, once a defendant demonstrates that the government has deliberately elicited incriminating evidence from him or her in the absence of counsel after the sixth amendment right to counsel has attached, he or she has established a sixth amendment violation. Once a violation is established, the court must tailor a remedy to neutralize the taint.<sup>667</sup> If the defendant is found not to have been prejudiced by the constitutional violation, a remedy would be unnecessary. Support for this position may be derived from the decision in *Morrison*. While the *Morrison* Court did not directly address the issue, the Court's reasoning would seem to indicate that the question of prejudice should be approached from the perspective of a remedy to a constitutional violation and not as an integral element of a sixth amendment violation.<sup>668</sup>

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660. *Id.* at 1237.

661. *Id.* at 1239. The Ninth Circuit has consistently required a showing of prejudice at trial in order to establish *Massiah* violations. See *United States v. Irwin*, 612 F.2d 1182, 1186-87 (9th Cir. 1980); *United States v. Glover*, 596 F.2d 857, 862-64 (9th Cir.), *cert. denied*, 444 U.S. 860 (1979).

662. 641 F.2d at 1239.

663. *Id.*

664. *Id.*

665. *Id.* at 1242 (Fletcher, J., concurring). Accord *United States v. Irwin*, 612 F.2d 1182, 1186-87 (9th Cir. 1980); *United States v. Glover*, 596 F.2d 857, 862-64 (9th Cir.), *cert. denied*, 444 U.S. 860 (1979).

666. 641 F.2d at 1242 (Fletcher, J., concurring).

667. See *Morrison*, 449 U.S. at 361.

668. See *id.* at 365.

## 6. The right to self-representation

Although a defendant may waive the right to the assistance of counsel, the assertion of the right to self-representation must constitute a knowing, competent, and intelligent waiver of the right to counsel.<sup>669</sup>

The Ninth Circuit recently upheld the conviction of a defendant who had "knowingly and intelligently" waived his right to counsel in *United States v. Romero*.<sup>670</sup> Romero, who had been convicted on five counts of willful failure to file income tax returns, had been represented by a public defender for approximately two months. The defendant then stated that he wished to appear *pro se*.<sup>671</sup>

The court concluded that, under the standards of *Cooper v. Fitzharris*,<sup>672</sup> Romero had been adequately represented until he requested discharge of the court-appointed counsel,<sup>673</sup> and that he had made a knowing and intelligent waiver of his right to counsel.<sup>674</sup> The trial court's consent to the defendant's request, the court held, was based upon Romero's constitutional right to represent himself.<sup>675</sup> The Ninth Circuit's holding was also influenced by the suspicion that Romero had made the waiver in an attempt to assure error in the proceedings.<sup>676</sup>

In *United States v. Halbert*<sup>677</sup> the Ninth Circuit reaffirmed that the sixth amendment right to the assistance of counsel does not necessarily include the absolute right to both self-representation and the assistance of counsel.<sup>678</sup> Whether to allow hybrid representation remains within

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669. *United States v. Dujanovic*, 486 F.2d 182, 185 (9th Cir. 1973).

670. 640 F.2d 1014 (9th Cir. 1981).

671. *Id.* at 1015-16.

672. 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979). See *supra* text accompanying notes 524-26.

673. 640 F.2d at 1016.

674. *Id.*

675. *Id.* (citing *Faretta v. California*, 422 U.S. 806, 835 (1975)); see also *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *United States v. Gillings*, 568 F.2d 1307, 1308-09 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978).

676. *Id.* at 1016. The court cited *United States v. Gillings*, 568 F.2d 1307 (9th Cir.), *cert. denied*, 436 U.S. 919 (1978), for the proposition that defendants often use the discharge of counsel as a ploy to claim an unknowing waiver, thus delaying criminal proceedings. This scenario is often used by tax protestors. 640 F.2d at 1016.

677. 640 F.2d 1000 (9th Cir. 1981) (per curiam).

678. *Id.* at 1009. The court stated that "[w]hile effective legal counsel is an essential right found in the Sixth Amendment, and the right to appear *pro se* is guaranteed by 28 U.S.C. § 1654, . . . the two rights are disjunctive." *Id.* (citing *United States v. Klee*, 494 F.2d 394, 396-97 (9th Cir.), *cert. denied*, 419 U.S. 835 (1974); *Duke v. United States*, 255 F.2d 721, 725-26 (9th Cir.), *cert. denied*, 357 U.S. 920 (1958)). Accord *United States v. Daniels*, 572 F.2d 535, 540 (5th Cir. 1978); *United States v. Sacco*, 571 F.2d 791, 793 (4th Cir.), *cert. denied*, 435 U.S. 999 (1978); *United States v. Cyphers*, 556 F.2d 630, 634 (2d Cir.), *cert. denied*, 431 U.S. 972 (1977).

the sound discretion of the trial judge.<sup>679</sup> The *Halbert* court found that the trial judge had not abused his discretion in denying the defendant's motion to appear as his own attorney in addition to his retained counsel.<sup>680</sup>

### C. Sixth Amendment Right to Present a Defense

#### 1. The right to confrontation

The sixth amendment to the United States Constitution guarantees the right of an accused in a criminal proceeding "to be confronted with the witnesses against him."<sup>681</sup> This right serves primarily "to prevent depositions or *ex parte* affidavits . . . [from] being used against . . . [a defendant] in lieu of a personal examination and cross-examination of the witness."<sup>682</sup> In addition, when properly asserted, it incidentally affords the judge and jury an opportunity to assess the demeanor and reliability of those individuals testifying.<sup>683</sup>

##### a. right to cross-examine

Included within the right to confrontation is an additional right empowering a criminally accused to cross-examine adverse witnesses.<sup>684</sup> Because cross-examination constitutes the principal means of assessing witness credibility and truthfulness,<sup>685</sup> federal courts recognize that a defendant's ability to exercise this additional right should remain relatively unfettered.<sup>686</sup> Thus, while the extent to which cross-

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679. 640 F.2d at 1009. *Accord* United States v. Daniels, 572 F.2d 535, 540 (5th Cir. 1978); United States v. Wilson, 556 F.2d 1177, 1178 (4th Cir.), *cert. denied*, 434 U.S. 986 (1977); United States v. Pinky, 548 F.2d 305, 310 (10th Cir. 1977); and United States v. Bennett, 539 F.2d 45, 49 (10th Cir.), *cert. denied*, 429 U.S. 925 (1976).

680. 640 F.2d at 1009-10.

681. U.S. CONST. amend. VI.

682. *Mattox v. United States*, 156 U.S. 237, 242 (1895).

683. *Id.* at 242-43.

684. *Pointer v. Texas*, 380 U.S. 400, 404 (1965) ("[T]he right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him . . .").

685. *Davis v. Alaska*, 415 U.S. 308, 316 (1974) ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are determined.").

686. *Smith v. Illinois*, 390 U.S. 129, 132-33 (1968) ("It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly apprise them . . .") (quoting *Alford v. United States*, 282 U.S. 687, 692-94 (1931)).

examination will be allowed remains within the trial court's discretion,<sup>687</sup> even a seemingly minor curtailment of this right will result in a sixth amendment violation.<sup>688</sup>

The right to cross-examine was recently at issue in three Ninth Circuit decisions. In *United States v. Willis*,<sup>689</sup> the Ninth Circuit considered whether a district court had violated this right by limiting the defendant's inquiry into the possible bias of a Government agent. Defendant Willis was indicted for possession of a controlled substance with the intent to distribute in violation of 21 U.S.C. section 841(a)(1).<sup>690</sup> The indictment resulted from a search of Willis' apartment by Drug Enforcement Administration agents which yielded approximately 400 grams of cocaine, chemicals used to process cocaine, and assorted narcotics paraphernalia.<sup>691</sup>

Willis' first trial began on December 11, 1978, but ended in a mistrial when he failed to appear two days later. He was subsequently apprehended in July of 1979 by a state narcotics officer named Griffin.<sup>692</sup> At Willis' second trial,<sup>693</sup> Griffin testified regarding the circumstances of the defendant's arrest. He informed the jury that: (1) the arrest had occurred in a bar known by him to be frequented by drug traffickers, and (2) during his initial questioning, Willis had asserted a false identity.<sup>694</sup>

In response to this testimony, Willis sought to cross-examine Griffin regarding his possible sexual involvement with Annette Coleman, the defendant's former live-in girl friend. The express purpose of this inquiry was to attack Griffin's credibility by showing his bias. The district court, however, prohibited this line of questioning, characterizing it as irrelevant and improper cross-examination.<sup>695</sup> Willis was subse-

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687. See FED. R. EVID. 611(a); *United States v. Weiner*, 578 F.2d 757, 766 (9th Cir.) ("The scope and extent of cross-examination is within the discretion of the trial court . . ."), *cert. denied*, 439 U.S. 981 (1978).

688. See, e.g., *Smith v. Illinois*, 390 U.S. 129, 130, 133 (1968) (trial court's refusal to allow cross-examination of a prosecution witness regarding his correct name and address constituted a violation of defendant's sixth amendment rights).

689. 647 F.2d 54 (9th Cir. 1981).

690. *Id.* at 55. 21 U.S.C. § 841(a)(1) (1976) provides: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

691. 647 F.2d at 55.

692. *Id.*

693. In addition to being retried for the initial offense, Willis also faced a charge of "bail jumping" at this trial. 647 F.2d at 55. See 18 U.S.C. § 3150 (1976).

694. 647 F.2d at 55.

695. *Id.*

quently convicted.<sup>696</sup>

On appeal, Willis argued that the district court had violated his confrontation rights by restricting his ability to cross-examine Griffin.<sup>697</sup> The Ninth Circuit agreed,<sup>698</sup> reasoning that "[t]he right to confront witnesses guaranteed by the sixth and fourteenth amendments includes the right to cross-examine witnesses to show their possible bias or self-interest in testifying."<sup>699</sup> The court also specified, however, that a violation of the confrontation clause occurs *only* when the restriction placed on cross-examination precludes inquiry into matters which are *actually relevant* to the issue of bias or prejudice.<sup>700</sup> It then noted that since disclosure of the relationship between Griffin and Coleman "might have shown a possible motive [on the part of Griffin] to lie . . . [and] might also have impugned his general character and believability in the eyes of the jury,"<sup>701</sup> this relevancy requirement was satisfied in the instant case.<sup>702</sup>

In *United States v. Seifert*,<sup>703</sup> the Ninth Circuit considered whether a Government witness' invocation of the fifth amendment had resulted

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696. *Id.* at 56.

697. *Id.* at 57.

698. *Id.* at 58.

699. *Id.* at 57 (quoting *Burr v. Sullivan*, 618 F.2d 583, 586 (9th Cir. 1980)). The court's reasoning is consistent with that articulated in decisions of the Supreme Court, *see supra* notes 685-86 and accompanying text, as well as that articulated in previous decisions of the Ninth Circuit. *See, e.g., Hughes v. Raines*, 641 F.2d 790, 792 (9th Cir. 1980) (right to cross-examine witnesses to impugn general credibility or demonstrate bias or self-interest included in right to confrontation); *United States v. Uramoto*, 638 F.2d 84, 87 (9th Cir. 1980) (right to cross-examination embodied in right to confrontation impermissibly limited when defendant given inadequate scope to impeach witness' credibility).

700. 647 F.2d at 58. *See Chipman v. Mercer*, 628 F.2d 528 (9th Cir. 1980). In *Chipman* an eyewitness named Ketchum testified at trial that she saw defendant Chipman acting suspiciously near the scene of a burglary. The defense offered to show that Ketchum was potentially biased against Chipman because he resided in a care facility for the mentally ill located in the proximity of Ketchum's home. On previous occasions, Ketchum had, among other things, accused residents of this facility of possessing stolen property. The trial court, however, refused to allow any questioning in these areas. *Id.* at 529-30.

The Ninth Circuit held that Chipman's right to confrontation had been violated. In so holding, the court recognized that although the area of cross-examination restricted was clearly relevant to the trial, some areas "may be of such minimal relevance that the trial court would be justified either in totally prohibiting cross-examination about them or in allowing only limited questioning." *Id.* at 531 (quoting *Skinner v. Caldwell*, 564 F.2d 1381, 1389 (9th Cir.), *cert. denied*, 435 U.S. 1009 (1978)).

701. 647 F.2d at 58.

702. *Id.*

703. 648 F.2d 557 (9th Cir. 1980).

in a violation of the defendants' right to cross-examine. Defendant Seifert and co-defendant Ehrlich were indicted for conspiring to transport and transporting in interstate commerce property taken by fraud in violation of 18 U.S.C. sections 2314<sup>704</sup> and 371.<sup>705</sup> The indictment charged both defendants with executing a scheme to swindle suppliers of photographic and electronic merchandise.<sup>706</sup>

At trial, a prosecution witness named Murray Saka testified that he had purchased a large quantity of such merchandise from Seifert and Ehrlich on at least three separate occasions.<sup>707</sup> Saka further testified that in order to finance the final purchases, he had found it necessary to procure a substantial loan.<sup>708</sup> On cross-examination, Saka was questioned regarding the identity of the individual from whom he had borrowed the money, but he declined to reply on the ground that his answer might incriminate him.<sup>709</sup> In response to this assertion of the fifth amendment, the defendants twice moved to strike his testimony.<sup>710</sup> The district court denied both motions and found the defendants guilty.<sup>711</sup>

Relying on *Davis v. Alaska*,<sup>712</sup> Seifert and Ehrlich argued on ap-

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704. *Id.* at 559. 18 U.S.C. § 2314 (1976) provides in pertinent part: "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of \$5,000 or more, knowing the same to have been stolen, converted or taken by fraud . . . shall be fined not more than \$10,000 or imprisoned not more than ten years, or both."

705. *Id.* at 559. 18 U.S.C. § 371 (1976) provides in pertinent part:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than \$10,000 or imprisoned not more than five years, or both . . .

706. 648 F.2d at 559. The scheme allegedly created by Seifert and Ehrlich operated in the following manner: the defendants established a retail store in Phoenix, Arizona which specialized in the sale of photographic and electronic equipment. For a number of months, they operated this store legitimately in order to establish a good credit rating with their suppliers. On the pretense of opening another store in the Phoenix area, the defendants then ordered large quantities of merchandise on credit. When the merchandise arrived, it was shipped out of state and sold in another part of the country. The defendants retained the proceeds and never paid any accounts outstanding. *Id.*

707. *Id.* at 559-60.

708. *Id.* at 559.

709. *Id.* at 560. Saka's express reason for refusing to provide the requested information was fear for his life. *Id.*

710. *Id.* When the fifth amendment is legitimately invoked by a witness during cross-examination, the appropriate remedy is to strike all or part of that witness' testimony if inquiry is blocked into matters which are "direct" and not merely "collateral." See, e.g., *United States v. Williams*, 626 F.2d 697, 702 (9th Cir.), cert. denied, 449 U.S. 1020 (1980).

711. 648 F.2d at 560.

712. 415 U.S. 308 (1974). In *Davis*, a key Government witness was on probation for prior commission of a felony when he testified at the defendant's trial. On cross-examination, the

peal that Saka's refusal to answer the question regarding his loan source deprived them of their sixth amendment rights to cross-examine and confront witnesses.<sup>713</sup> The Ninth Circuit, however, rejected this argument, holding that the defendants' sixth amendment rights had not, in fact, been violated.<sup>714</sup> The court reasoned that any reliance on *Davis* was misplaced because that case involved a disparate fact pattern.<sup>715</sup> In addition, the court noted that in seeking to protect Saka from an attempted invasion of his privilege against self-incrimination, the district court had operated in accordance with Supreme Court mandate.<sup>716</sup>

Finally, in *United States v. Benedict*,<sup>717</sup> the Ninth Circuit considered the effect on a defendant's right to cross-examine occasioned by the Government's use of secondary evidence. Defendant Benedict was indicted for conspiring to import heroin into the United States from Thailand in violation of 21 U.S.C. section 963,<sup>718</sup> and for conspiring to possess and distribute heroin within the United States in violation of 21

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defendant sought to elicit this information from the witness in order to demonstrate a possible bias in favor of the prosecution. The district court, however, refused to allow the inquiry. The Supreme Court reversed, holding that the restriction on the defendant's ability to cross-examine resulted in a violation of his sixth amendment rights. *Id.* at 318.

713. 648 F.2d at 562-63.

714. *Id.*

715. *Id.* The court noted that while the defendant in *Davis* had attempted to elicit testimony from a Government witness regarding that witness' prior conviction and then current status as a probationer, defendants Seifert and Ehrlich sought to question Saka regarding the source of a loan. *Id.* This distinction apparently formed the basis for the court's dual determination that the *Davis* ruling was inapplicable, and that the defendants' sixth amendment rights had, therefore, not been violated. *Id.*

While the court's reasoning is cursory, the decision reached has considerable merit. The defendant in *Davis* based his entire defense on a theory that the Government witness was not credible because he may have equated failure to cooperate with revocation of his probation. 415 U.S. at 311. See *supra* note 712. The defendant's inability to cross-examine that witness regarding his probation, thus, effectively prevented him from proving this theory and, accordingly, resulted in a violation of his confrontation rights. *Id.*

In contrast, the defense theory asserted in *Seifert* was that Saka and another individual had created the scheme to defraud, not Seifert and Ehrlich as the indictment charged. 648 F.2d at 562. Development of this theory was not, however, dependent on Saka's disclosure of his loan source. Consequently, his invocation of the fifth amendment neither prevented the defendants from adequately presenting their defense, nor resulted in a confrontation clause violation. *Id.* See *id.* at 561-62.

716. 648 F.2d at 562-63. The mandate referred to by the Ninth Circuit is found in the very case relied on by the defendants, *Davis v. Alaska*, 415 U.S. 308 (1974). There, the Court recognized that the trial court has a duty to protect a witness from "an attempted invasion of his constitutional protection from self-incrimination, properly invoked." *Id.* at 320 (quoting *Alford v. United States*, 282 U.S. 687, 692-94 (1931)).

717. 647 F.2d 928 (9th Cir.), *cert. denied*, 454 U.S. 1088 (1981).

718. *Id.* at 929. 21 U.S.C. § 963 (1976) provides: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or

U.S.C. section 846.<sup>719</sup> Part of the heroin in question was discovered by customs officials during a routine inspection of large-model radio sets that Benedict had marked for exportation.<sup>720</sup> The remaining portion was located in his Thailand apartment following a search by the Royal Thai Police and United States Drug Enforcement Administration agents.<sup>721</sup> This search also yielded shipping documents and various packing tools.<sup>722</sup>

During Benedict's trial, Thai authorities refused to release most of the relevant physical evidence.<sup>723</sup> The Government was thus compelled to rely on secondary evidence which consisted of: (1) oral testimony of the witnesses who had personally examined or handled the primary evidence;<sup>724</sup> (2) photographs of the radios and a bag allegedly containing the heroin found at Benedict's residence;<sup>725</sup> and (3) photocopies of any necessary documents, reports, etc.<sup>726</sup> On the basis of this evidence, Benedict was subsequently convicted.<sup>727</sup>

On appeal, Benedict argued that his confrontation rights had been violated by the unavailability of physical evidence that allegedly would have aided him in cross-examination.<sup>728</sup> His only supporting authority, however, was *United States v. Loud Hawk*.<sup>729</sup> The Ninth Circuit ini-

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both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

The subchapter referred to delineates offenses for the importation and exportation of controlled substances.

719. *Id.* at 929. 21 U.S.C. § 846 (1976) provides: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

The subchapter referred to delineates offenses for the manufacture, possession, and distribution of controlled substances.

720. 647 F.2d at 929.

721. *Id.* at 930.

722. *Id.*

723. *Id.* at 931. This unwillingness stemmed from the fact that Thai authorities were maintaining a pending prosecution against Benedict and required the presence of the physical evidence at their own proceeding. *Id.*

724. *Id.*

725. *Id.*

726. *Id.*

727. *Id.*

728. *Id.*

729. 628 F.2d 1139 (9th Cir. 1979) (en banc), cert. denied, 445 U.S. 917 (1980). In *Loud Hawk*, state police officers destroyed dynamite seized from the defendant before federal officials could obtain a sample. As a result, when the defendant was subsequently tried for the federal crime of possessing a destructive device, the Government was forced to introduce secondary evidence of the contraband consisting of photographs and testimony of state officers. Acknowledging that when evidence is lost or destroyed, the proper balance is that between "the Government's conduct and the degree of prejudice to the accused," *id.* at 1152,



tially noted that the individuals "who observed, handled or tested the primary evidence . . . [were] the subject of cross-examination, . . . not the evidence itself."<sup>730</sup> The court then reasoned that since Benedict had been able to question those individuals, the absence of any primary evidence had not violated his right to cross-examine.<sup>731</sup> The court further explained that the defendant's reliance on *Loud Hawk* was inappropriate for two reasons: (1) the court in *Loud Hawk* considered an issue unrelated to that presented in *Benedict*,<sup>732</sup> and (2) even after employing the balancing test articulated in *Loud Hawk*, there was no evidence of Government misconduct and only "nonexistent or minimal"

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the Ninth Circuit concluded that: (1) a federal agent's presence at the destruction of the dynamite amounted to misconduct, but was excusable in light of the fact that the agent had not encouraged the destruction, and (2) there was no prejudice to the defendant. *Id.* at 1154-55.

730. 647 F.2d at 932.

731. *Id.* The court's reasoning is consistent with that enunciated in previous Ninth Circuit decisions. See *United States v. Sewar*, 468 F.2d 236, 238 (9th Cir. 1972) (unavailability of blood sample taken from defendant and tested for alcoholic content did not violate his right to confrontation since technician who performed test was available for cross-examination), *cert. denied*, 410 U.S. 916 (1973). Cf. *United States v. Ortiz*, 603 F.2d 76, 80 (9th Cir. 1979) (destruction of heroin before trial did not compel suppression of chemist's testimony regarding nature of substance since defendant exercised right to cross-examine), *cert. denied*, 444 U.S. 1020 (1980); *Munich v. United States*, 363 F.2d 859, 860-61 (9th Cir. 1966) (destruction of evidence before retrial did not preclude defendant's conviction since he cross-examined witness who testified as to nature of evidence), *cert. denied*, 386 U.S. 974 (1967).

It should be noted that the *Benedict* court also relied on two additional lines of authority providing apt, if somewhat more remote, support for the admission of secondary evidence. In the first line of cases, the Government's good faith attempt, but ultimate failure, to obtain the presence at trial of an informant was not considered grounds for reversing a conviction. *United States v. Hart*, 546 F.2d 798, 799 (9th Cir. 1976), *cert. denied*, 429 U.S. 1120 (1977); *United States v. Leon*, 487 F.2d 389, 392 (9th Cir. 1973). Reasoning that a similar rule should apply when physical evidence is unavailable, the court noted that the defendant did not suggest a valid basis for impugning the Government's good faith. Therefore, the court concluded that the Government's use of secondary evidence, after failing to secure primary evidence, did not warrant reversal of the defendant's conviction. 647 F.2d at 932.

In the second line of cases, when the prosecution was unable to obtain a witness from a foreign jurisdiction, it was permitted to use reliable secondary evidence as a substitute without violating the confrontation clause. *Mancusi v. Stubbs*, 408 U.S. 204, 212-13 (1972). Again reasoning that a similar rule should apply when physical evidence was unobtainable, the court concluded that since the defendant cross-examined all witnesses who had observed the primary evidence, their testimony established the reliability of the secondary evidence. The admission of that evidence had not, therefore, violated the confrontation clause. 647 F.2d at 932.

732. 647 F.2d at 932. In *Loud Hawk*, the Ninth Circuit considered whether the trial court properly suppressed secondary evidence when the Government had in fact destroyed any relevant primary evidence prior to the defendant's trial. In contrast, the issue presented in *Benedict* was whether the use of secondary evidence deprived the defendant of his right to confront witnesses. *Id.* at 931.

prejudice to the defendant.<sup>733</sup>

*b. hearsay evidence*

Hearsay is defined as any out-of-court statement "offered . . . to prove the truth of the matter asserted."<sup>734</sup> When such a statement is both adverse to the interests of a defendant, *and* is admitted into evidence at that defendant's trial through a recognized hearsay exception,<sup>735</sup> the confrontation clause has potentially been violated.<sup>736</sup>

In an effort to simplify the process of determining precisely when such a violation occurs, the Supreme Court has devised the following test: unless the prosecution can prove the "necessity" *and* "reliability" of otherwise admissible hearsay evidence, the rights afforded a defendant under the confrontation clause are deemed to have been violated and the evidence is rendered inadmissible.<sup>737</sup> According to the Court, the requirement of "necessity" is satisfied when the prosecution demonstrates the unavailability of the declarant whose statement it wishes to use against the defendant.<sup>738</sup> "Reliability," on the other hand, is established when the prosecution demonstrates the trustworthiness of the evidence.<sup>739</sup>

In *United States v. Perez*,<sup>740</sup> the Ninth Circuit considered whether hearsay evidence admitted under the co-conspirator exception had vio-

733. *Id.* at 932. See *supra* note 729.

734. FED. R. EVID. 801(c).

735. Hearsay exceptions vary among jurisdictions as to number, nature, and detail. Those applicable at the federal level are described in FED. R. EVID. 803, 804. For an example of state exceptions, see CAL. EVID. CODE §§ 1220-1340.

736. *Ohio v. Roberts*, 448 U.S. 56, 64-65 (1980) (defendant's confrontation rights potentially violated when hearsay evidence admitted under unavailability exception); *Dutton v. Evans*, 400 U.S. 74, 86-89 (1970) (defendant's confrontation rights potentially violated when hearsay evidence admitted under co-conspirator exception); *California v. Green*, 399 U.S. 149, 155-56 (1970) (defendant's confrontation rights potentially violated when hearsay evidence admitted under prior inconsistent statements exception).

The Supreme Court has also recognized, however, that hearsay evidence found in dying declarations and cross-examined prior trial testimony "rest[s] upon such solid foundations that [its] admission . . . comports with the 'substance of the [confrontation clause].'" *Ohio v. Roberts*, 448 U.S. 56, 66 (1980) (quoting *Mattox v. United States*, 156 U.S. 237, 244 (1895)).

737. *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980).

738. *Id.* at 65. The requirement of "necessity" is not, however, absolute. When the "utility of trial confrontation is remote," the prosecution is not required to produce a seemingly available witness. *Id.* at 65 n.7. In addition, testimony that is neither "crucial" to the prosecution nor "devastating" to the defendant is conceivably exempt from the "necessity" requirement. See *Dutton v. Evans*, 400 U.S. 74, 87-89 (1970); *United States v. Fielding*, 630 F.2d 1357, 1368 (9th Cir. 1980).

739. *Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980).

740. 658 F.2d 654 (9th Cir. 1981).

lated the defendant's right to confront and cross-examine witnesses. Defendant, Ruvalcaba-Villalobos ("Villalobos"), was convicted of conspiring to distribute and distributing cocaine in violation of 21 U.S.C. sections 846<sup>741</sup> and 841.<sup>742</sup> His conviction was based, in part, on the admission of testimony given by two undercover Drug Enforcement Administration agents in which they related statements made by co-conspirator Perez.<sup>743</sup>

On appeal, Villalobos argued that in admitting this evidence, the district court had effectively denied him his constitutional right to confront and cross-examine the absent co-conspirator declarant.<sup>744</sup> Specifically, he contended that the co-conspirator's statements were inadmissible because their "reliability" could not be established.<sup>745</sup>

After noting that an inquiry into possible confrontation clause violations is especially necessary when hearsay evidence is admitted under the co-conspirator exception,<sup>746</sup> the Ninth Circuit examined Perez' statements in light of four "reliability" factors enunciated in *Dutton v. Evans*.<sup>747</sup> Based on this examination, his statements were found to be

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741. *Id.* at 658. 21 U.S.C. § 846 (1976) provides: "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

742. *Id.* at 658. 21 U.S.C. § 841(a)(1) (1976) provides: "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

743. 658 F.2d at 658. Perez was initially indicted with Villalobos, but pled guilty to the charge of distributing cocaine. *Id.* at 661. The statements he made concerned a prospective drug transaction between himself, Villalobos, and the DEA agents. *Id.* at 657.

744. *Id.* at 660.

745. *Id.* at 661. Villalobos did not contest the "necessity" of the statements. *Id.*

746. *Id.* at 660. The Ninth Circuit has consistently so held. See *United States v. Fielding*, 630 F.2d 1357, 1366 (9th Cir. 1980) ("[T]he admissibility of a statement under [the co-conspirator] exception does not normally establish compliance with the confrontation clause."). See also *United States v. Snow*, 521 F.2d 730, 734 (9th Cir. 1975), *cert. denied*, 423 U.S. 1090 (1976); *United States v. Baxter*, 492 F.2d 150, 177 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974). However, not all circuits apply such a strict level of scrutiny. See *Ottomano v. United States*, 468 F.2d 269, 273 (1st Cir. 1972) (hearsay evidence admissible under co-conspirator exception automatically results in satisfaction of all possible confrontation clause infirmities), *cert. denied*, 409 U.S. 1128 (1973).

747. 400 U.S. 74 (1970). The Court, in *Dutton*, held that the "reliability" of hearsay evidence admitted under the co-conspirator exception is generally established when: (1) the declaration in question contains no assertions of past fact; (2) the declarant has personal knowledge of the identity and role of the participants in the crime; (3) the declarant cannot possibly have been relying upon faulty recollection; and (4) the circumstances under which the statements were made provide no reason to believe that the declarant has misrepresented the defendant's involvement in the crime. *Id.* at 88-89. The Court did not, however, specify how many of these factors need be present in order to indicate reliability. This ambiguity

reliable. According to the court, the statements contained no assertions of past fact because they consisted primarily of telephone conversations between the declarant Perez and the defendant;<sup>748</sup> Perez had personal knowledge of the participants because he was the brother-in-law of the defendant and had conducted drug transactions with him in the past;<sup>749</sup> there was little risk that Perez was relying on faulty memory because the statements concerned an ongoing or prospective activity;<sup>750</sup> and finally, Perez had little to gain by misrepresenting the defendant's involvement in the crime because the statements were clearly contrary to his penal interests.<sup>751</sup> The Ninth Circuit, therefore, concluded that the admission of these statements at Villalobos' trial did not result in a violation of his confrontation rights.<sup>752</sup>

## 2. The right to compulsory process

The sixth amendment to the United States Constitution also guarantees the right of an accused in a criminal proceeding "to have compulsory process for obtaining witnesses in his favor."<sup>753</sup> This clause essentially affords a defendant the right to present a defense by offering the testimony of favorable witnesses and compelling their attendance if necessary.<sup>754</sup>

The Ninth Circuit recently addressed the right to compulsory process in *United States v. Valenzuela-Bernal*.<sup>755</sup> Defendant Valenzuela-Bernal ("Bernal"), a Mexican citizen, was arrested by the United States Border Patrol while attempting to transport five illegal aliens by automobile from Escondido, California to the Los Angeles area.<sup>756</sup> Three of the five aliens who had been traveling as passengers in Bernal's vehicle were also taken into custody.<sup>757</sup> According to border patrol agents, none of these passengers made any statements exculpating Bernal dur-

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led the Ninth Circuit to rule in at least one instance that the presence of factors (2) and (3) established the "reliability" of hearsay evidence. *United States v. Snow*, 521 F.2d 730, 735 (9th Cir. 1975).

748. 658 F.2d at 661.

749. *Id.*

750. *Id.* at 662.

751. *Id.*

752. *Id.* at 660.

753. U.S. CONST. amend. VI.

754. *Washington v. Texas*, 388 U.S. 14, 19 (1967) ("Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense.").

755. 647 F.2d 72 (9th Cir. 1981).

756. *Id.* at 72-73.

757. *Id.* at 73. Two of the illegal aliens escaped on foot and were never located by the border patrol. *Id.*

ing their interrogation.<sup>758</sup> Following a discussion with an assistant United States Attorney, the border patrol detained one passenger and deported the others to Mexico.<sup>759</sup>

Bernal was subsequently indicted on one count of transporting an illegal alien in violation of 8 U.S.C. section 1324(a)(2).<sup>760</sup> After unsuccessfully attempting to secure the appearance of the aliens deported,<sup>761</sup> Bernal moved to dismiss the indictment on the grounds that the Government's deportation action violated his fifth amendment right to due process and his sixth amendment right to compulsory process.<sup>762</sup> The trial judge denied Bernal's motion and convicted him of the offense charged.<sup>763</sup>

On appeal, Bernal argued that the trial court had erred by failing to apply the doctrine enunciated in *United States v. Mendez-Rodriguez*.<sup>764</sup> This doctrine provides that the due process and compulsory process clauses are deemed to have been violated when the Government places a potential alien witness beyond the court's subpoena power before allowing the defendant an opportunity to interview that individual.<sup>765</sup>

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758. *Id.*

759. *Id.*

760. *Id.* at 73. 8 U.S.C. § 1324(a)(2) (1976) provides in pertinent part:

(a) Any person, including the owner, operator, pilot, master, commanding officer, agent, or consignee of any means . . . of transportation who—

(2) knowing that he is in the United States in violation of law, and knowing or having reasonable grounds to believe that his last entry into the United States occurred less than three years prior thereto, transports, or moves, or attempts to transport or move, within the United States by means of transportation or otherwise, in furtherance of such violation of law; . . . any alien . . . shall be guilty of a felony, and upon conviction thereof shall be punished by a fine not exceeding \$2,000 or by imprisonment for a term not exceeding five years, or both, for each alien in respect to whom any violation of this subsection occurs

. . . .

761. 647 F.2d at 73.

762. *Id.*

763. *Id.*

764. 450 F.2d 1 (9th Cir. 1971).

765. *Id.* at 5. In *Mendez-Rodriguez*, the defendant was convicted of transporting six illegal aliens within the United States. Three of the aliens were detained by the Government and three were deported before the defendant was able to interview them. At trial, the defendant raised the defense that he had not known the individuals transported were illegal aliens. Testimony which tended to corroborate this claim was offered by the aliens remaining in the United States. The Ninth Circuit reversed the district court's judgment of conviction, holding that the Government's deportation of the aliens violated the defendant's fifth amendment right to due process and his sixth amendment right to compulsory process. *Id.* at 4-5.

As the Ninth Circuit explained later in *United States v. Tsutagawa*, 500 F.2d 420, 423 (9th Cir. 1974), "[t]he thrust of *Mendez-Rodriguez* is to prevent the basic unfairness of allowing the government to [unilaterally] determine which witnesses will not help either side

In considering the applicability of *Mendez-Rodriguez*, the Ninth Circuit noted that the doctrine was not controlling when: (1) a defendant would not "conceivably benefit" from the deported alien's testimony,<sup>766</sup> or (2) the alien's unavailability was not the result of *unilateral* Government action.<sup>767</sup> The court reasoned, however, that because the instant case involved the deportation of two aliens who were both eyewitnesses to and active participants in the offense with which Bernal was charged, there existed "a strong possibility that [these aliens] could have provided material and relevant information concerning the events constituting the crime."<sup>768</sup> Moreover, they may have corroborated Bernal's claim that although he had provided them with transportation, he remained unaware of their status as illegal aliens.<sup>769</sup> The circuit court, thus, concluded that not only was the *Mendez-Rodriguez* doctrine applicable, but once applied, it required a reversal of Bernal's conviction.<sup>770</sup>

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and then to release those witnesses, for all practical purposes, beyond the reach of the defendant."

766. 647 F.2d at 74. A deported alien's testimony is normally considered of "conceivable benefit" to a defendant when that alien was an *eyewitness* to the criminal offense and may have been able to offer evidence in support of the accused. See *United States v. Gonzales*, 617 F.2d 1358, 1363 (9th Cir.) (testimony of "conceivable benefit" to defendant when deported alien was present at crime scene and may have been material witness to defendant's alleged criminal conduct), *cert. denied*, 449 U.S. 899 (1980).

Conversely, however, when a deported alien was not an eyewitness to the offense, the Ninth Circuit has been unwilling to assume that the alien's testimony could "conceivably benefit" the defendant. See *United States v. Martinez-Morales*, 632 F.2d 112, 115 (9th Cir. 1980) (*Mendez-Rodriguez* doctrine considered not controlling when missing alien did not witness criminal act); *accord* *United States v. Sanchez-Murillo*, 608 F.2d 1314, 1318 (9th Cir. 1978); *United States v. Castellanos-Machorro*, 512 F.2d 1181, 1183 (9th Cir. 1975); *United States v. McQuillan*, 507 F.2d 30, 33 (9th Cir. 1974).

767. 647 F.2d at 75 n.3. The Ninth Circuit has consistently found the *Mendez-Rodriguez* doctrine inapplicable in such circumstances. See, e.g., *United States v. Hernandez-Gonzales*, 608 F.2d 1240, 1246 (9th Cir. 1979) (*Mendez-Rodriguez* doctrine inapplicable when potential alien witness escaped country through self-effectuated trickery); *United States v. Francisco-Romandia*, 503 F.2d 1020, 1021 (9th Cir. 1974) (*Mendez-Rodriguez* doctrine inapplicable when potential alien witness left country following release by court order), *cert. denied*, 420 U.S. 910 (1975); *United States v. Carrillo-Frausto*, 500 F.2d 234, 235-36 (9th Cir. 1974) (*Mendez-Rodriguez* doctrine inapplicable when potential alien witness fled following release by magistrate); *United States v. Verduzco-Macias*, 463 F.2d 105, 106-07 (9th Cir.) (*Mendez-Rodriguez* doctrine inapplicable when Government did not physically move potential alien witness outside court's jurisdiction), *cert. denied*, 409 U.S. 883 (1972).

768. 647 F.2d at 75.

769. *Id.*

770. *Id.*

### D. *The Right to a Speedy Trial*

The Speedy Trial Act, 18 U.S.C. sections 3161-3174<sup>771</sup> (the Act), implements the right of the accused to a speedy trial as guaranteed by the sixth amendment of the Constitution.<sup>772</sup> Embodied in the Act is a set of time limits for carrying out major events in the prosecution of federal criminal cases, such as the information, indictment, arraignment, and trial.

During the survey period, the Ninth Circuit addressed several questions arising under the Speedy Trial Act, including whether a district court violated the Act when it excluded from the allowable period the delay caused by a volcanic eruption<sup>773</sup> and when it granted a continuance to enable the Government to locate three essential witnesses.<sup>774</sup> The Ninth Circuit also confronted the issue of whether an appellant was denied his constitutional right to a speedy trial when the Government obtained a second indictment against him following the district court's refusal to order his extradition.<sup>775</sup> Finally, the Ninth Circuit was asked to determine whether the speedy trial rights of inmates in a federal penitentiary were violated by a ten-month delay between their detention in an Administrative Detention Unit and the date of their trial.<sup>776</sup>

#### 1. The Speedy Trial Act

In *Furlow v. United States*,<sup>777</sup> the Ninth Circuit affirmed appellant Furlow's conviction of possessing and uttering a United States Treasury check with intent to defraud the United States.<sup>778</sup> One of the grounds upon which Furlow sought reversal of his conviction was that he had been denied his right to a speedy trial under the Speedy Trial Act. Furlow's trial, scheduled to begin on May 20, 1980, was delayed

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771. 18 U.S.C. §§ 3161-3174 (1976).

772. The sixth amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

773. *Furlow v. United States*, 644 F.2d 764 (9th Cir. 1981).

774. *United States v. Fielding*, 645 F.2d 719 (9th Cir. 1981).

775. *United States v. Moore*, 653 F.2d 384 (9th Cir. 1981).

776. *United States v. Mills*, 641 F.2d 785 (9th Cir. 1981).

777. 644 F.2d 764 (9th Cir. 1981).

778. *Id.* at 769. Furlow's actions constituted a violation of 18 U.S.C. § 495 (1976).

by the May 18 eruption of Mt. St. Helens, a volcano in western Washington. It was rescheduled for June 17, 1980.<sup>779</sup>

The Speedy Trial Act requires that the trial of "a detained person who is being held in detention solely because he is awaiting trial . . . shall commence not later than 90 days following the beginning of such continuous detention or designation of high risk by the attorney for the Government."<sup>780</sup> Furlow claimed that 116 days had elapsed between his arrest on February 22 and the beginning of the trial on June 17. As he conceded, however, the United States Magistrate had released him from custody on May 13, within the ninety-day period. Although Furlow protested that he had been immediately reincarcerated, the court was satisfied that the reincarceration had been for additional charges unrelated to the federal charges. Therefore, he was no longer being detained "solely because he [was] awaiting trial" on federal charges.<sup>781</sup>

The Speedy Trial Act also requires that a defendant be brought to trial within 70 days "from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs."<sup>782</sup> In *Furlow*, the 70-day period began to run when the appellant was arraigned on March 12, 1980. Thus, May 21, 1980 was the last day trial could have begun within the time limit.<sup>783</sup>

On April 24, however, Furlow filed a motion to dismiss the case for lack of prosecution, which was denied on May 5. In the order denying the motion, the district court found the period between April 24 and May 5 to be excludable time under 18 U.S.C. section 3161(h)(1)(F). Section 3161(h)(1)(F) excludes from the computation of the time within which an information or indictment must be filed or a trial must commence any delays resulting from pretrial motions "from the filing of the motion through the conclusion of the hearing on . . . such motion."<sup>784</sup> The Ninth Circuit affirmed this ruling and concluded that this period of excludable time extended the last possible date of

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779. 644 F.2d at 768. Although Furlow was indicted on October 1, 1979, he was not apprehended until February 22, 1980, and was returned to Washington on or about March 3, 1980. *Id.* at 767.

780. 18 U.S.C. § 3164 (1976).

781. 644 F.2d at 768.

782. 18 U.S.C. § 3161(c)(1) (1976).

783. 644 F.2d at 768.

784. *Id.*



trial to June 2.<sup>785</sup>

Finally, the Ninth Circuit determined that the district court was justified in finding June 4 through June 17 to be excludable under 18 U.S.C. section 3161(h)(8)(A)<sup>786</sup> in light of the impact of the volcanic eruption.<sup>787</sup> The Ninth Circuit considered the following factors: the length of the delay, the reasons for the delay, defendant's assertion of his rights, and the resulting prejudice.<sup>788</sup> Because the delays in *Furlow* were "relatively brief," no prejudice occurred.<sup>789</sup>

The *Furlow* court was also satisfied that the district court "preserved the procedural safeguards" required by the due process clause.<sup>790</sup> In this respect, *Furlow* was distinguishable from other cases in which the court had found a violation of the Speedy Trial Act.<sup>791</sup>

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785. *Id.*

786. Section 3161(h)(8)(A) provides for the exclusion of:

Any period of delay resulting from a continuance granted by the judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

18 U.S.C. § 3161(h)(8)(A) (1976).

787. 644 F.2d at 768-69. The eruption of Mt. St. Helens on May 18, 1980 necessitated a rescheduling of the trial. In its order, the district court ruled that the period from June 4 through June 17 was excludable time because of emergency conditions. The Ninth Circuit observed that the district court may have erred in not including June 2 and 3 in its order, because the time period from March 12 to June 17, less the time encompassed by the two exclusion orders, was 72 days. This exceeded the 70 days permitted by § 3161(c)(1). The Ninth Circuit concluded, however, that the district court's clear intention to exclude the delay caused by the eruption was controlling, notwithstanding the error. *Id.* at 768.

788. *Id.* at 769.

789. *Id.* (citing *United States v. Metz*, 608 F.2d 147, 152 (5th Cir. 1979), *cert. denied*, 449 U.S. 821 (1980)). Appellant Metz appealed his conviction of conspiracy to possess cocaine with intent to distribute, in violation of 21 U.S.C. § 846 (1976), on numerous grounds, one of which was violation of the Speedy Trial Act. His indictment came 64 days after arrest, rather than 45 days, as required by §§ 3161(b) & (f). He was arraigned 14 days after the indictment, rather than within 10 days, as required by § 3161(c). Sections 3161(c) and (g) require that trial take place within 120 days of the arraignment, but the appellant's trial began 172 days after arraignment. *Id.* at 151-52. The Fifth Circuit found that these relatively brief delays did not rise to the level of presumptive prejudice, and therefore there was no unconstitutional delay. *Id.*

790. 644 F.2d at 769.

791. The Ninth Circuit found *Furlow* to be "clearly distinguishable" from *Klopfer v. North Carolina*, 386 U.S. 213 (1967). In *Klopfer*, the defendant had been indicted for a misdemeanor. Following the jury's failure to reach a verdict, the trial judge declared a mistrial and ordered the case continued for the term. Some eighteen months later the prosecutor moved that the state be permitted to take a *nolle prosequi* with leave. *Id.* at 217-18.

The court concluded: "Within the limits of the Sixth Amendment and the Speedy Trial Act a district court has inherent power to control its own docket to ensure that cases proceed before it in a timely and orderly fashion."<sup>792</sup> The court thus found no violation of the Speedy Trial Act and affirmed Furlow's conviction.<sup>793</sup>

In *United States v. Fielding*,<sup>794</sup> the Ninth Circuit held that the district court properly acted within its discretion in granting a motion for a continuance pursuant to section 3161(h)(8)(A).<sup>795</sup> Appellant Fielding was indicted on July 15, 1975, but was not arrested until April 1979. He was arraigned on May 30, 1979. On the scheduled trial date, July 16, 1979, the Government was unable to locate three essential witnesses and moved for a one-month continuance. The district court granted the Government's motion, finding that the continued time was excludable under the "ends of justice" exclusion provision of the Speedy Trial Act.<sup>796</sup> Fielding claimed that the continuance was unjustified and that it delayed his trial in violation of the Speedy Trial Act.<sup>797</sup> He contended, therefore, that the case against him should be dismissed pursu-

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This North Carolina procedural device permitted the Government to remove a case from the calendar with leave to restore it for an indeterminate period. During that period, the defendant could not obtain a dismissal or have the case restored to the calendar for trial. *Id.* at 214. The Supreme Court held that even though the defendant had been discharged from custody, his liberty remained restricted by the social implications of the pendency of the indictment, and therefore his right to a speedy trial had been denied. *Id.* at 222.

The Ninth Circuit found "[n]o such shadowy process" at work in *Furlow*, where the district court had specified a trial date. 644 F.2d at 769. The court cited *United States v. Didier*, 542 F.2d 1182 (9th Cir. 1976), as an additional example of abuse of procedural safeguards. In *Didier*, as in *Klopper*, the district court granted a *sine die* continuance. The Second Circuit reversed the defendant's conviction, finding no excuse for the excessive delay. *Id.* at 1189-90.

<sup>792.</sup> 644 F.2d at 769. The court distinguished *United States v. Tirasso*, 532 F.2d 1298 (9th Cir. 1976). In *Tirasso*, the defendants argued successfully that they should be released from custody because they had been held without bail longer than the 90-day permissible period, in violation of § 3164(c), which provides that "[n]o detainee . . . shall be held in custody pending trial after the expiration of such ninety-day period." *Furlow* involved a defendant's right to have his conviction reversed because of the violation of his rights under the Speedy Trial Act, not his right to release from custody if the 90-day period were exceeded.

<sup>793.</sup> 644 F.2d at 769.

<sup>794.</sup> 645 F.2d 719 (9th Cir. 1981). Fielding was convicted of importation and conspiracy to import marijuana with intention to distribute the drug. *Id.* at 720.

<sup>795.</sup> *Id.* at 722; see *supra* note 786.

<sup>796.</sup> 645 F.2d at 720 (citing § 3161(h)(8)(A)).

<sup>797.</sup> *Id.* at 720-21. He did not claim, however, that his constitutional right to a speedy trial had been violated by the granting of a continuance nor that the District Plan for Prompt Disposition of Criminal Cases had been violated. *Id.* at 721 n.4.

ant to section 3162.<sup>798</sup>

The Ninth Circuit explained that the appropriate standard for review of the district court's granting of the motion for continuance depends upon whether the challenged determination is legal, factual, or both.<sup>799</sup> Noting that only factual findings were at issue in *Fielding*, the court stated the standard of review set forth in section 3161(h)(8)(A): "the judge must explicitly set forth his reasons for finding that the ends of justice served by the continuance outweigh other interests protected by the Act."<sup>800</sup> The court continued: "[S]uch a factual finding should not be disturbed unless 'clearly erroneous.'"<sup>801</sup>

In applying these standards to the district court's factual findings at the hearing on the motion,<sup>802</sup> the Ninth Circuit found that the trial judge had stated his reasons for believing that the ends of justice served by the continuance outweighed the other interests protected by the Act. The reasons were set forth in the trial court's order granting the motion:

(1) The Government, despite the exercise of due diligence, has been unable to determine the whereabouts of three essential witnesses . . . (2) Failure to grant the requested continuance would be likely to result in a miscarriage of justice. (3) Therefore, the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial . . .<sup>803</sup>

Fielding contended that, although the section 3161(h)(8) exclusion and finding were appropriate, the standard for the continuance should have been that of subsection (h)(3)<sup>804</sup> because the continuance was

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798. *Id.* at 720. Section 3162 (1976) establishes sanctions for failure to indict or bring to trial within the time limits imposed by § 3161.

799. 645 F.2d at 721.

800. *Id.* at 722 (citing § 3161(h)(8)(A)).

801. 645 F.2d at 722 (quoting FED. R. CRV. P. 52(a)).

802. At the hearing, the following facts were disclosed: (1) the indictment had been handed down four years prior to the time of the motion; Fielding was a fugitive during this time; (2) attempts to locate witnesses began in May 1979, but the United States had trouble locating those witnesses; although the witnesses' current addresses were unknown, the Government believed it could locate the witnesses and subpoenas were issued on June 19, 1979; and (3) on July 11, 1979, material witness warrants were issued. At the time of the hearing, only one of the witnesses, who was hostile and unwilling to talk to the United States Attorney, had been located. 645 F.2d at 722.

803. *Id.*

804. Section 3161(h)(3)(A) provides that periods of delay resulting from the absence or unavailability of the defendant or an essential witness shall not be included in the time period within which a defendant must be indicted or tried. "Absence" and "unavailability" are defined in subparagraph B of § 3161(h)(3):

(B) For purposes of subparagraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, in

based upon the unavailability of a witness.<sup>805</sup> The Ninth Circuit noted, however, that even if the standard of subsection (h)(3) was appropriate, the record of the hearing revealed that this standard had in fact been applied.<sup>806</sup> Furthermore, the court observed that under section 3162(a)(2),<sup>807</sup> the defendant bears the burden of supporting a motion to dismiss, although the Government has the burden of going forward with the evidence in connection with a section 3161(h)(3) exclusion. Holding that the government had met its burden with a showing of necessity and unavailability, and that Fielding had failed to rebut these showings, the Ninth Circuit concluded that the continuance was justified and that the Speedy Trial Act was not violated.<sup>808</sup>

## 2. Sixth amendment right to a speedy trial

In *United States v. Moore*,<sup>809</sup> appellant asserted that the Government had violated his constitutional right to a speedy trial. Appellant was convicted of three counts of soliciting money in exchange for his promise not to testify at the trial of another, in violation of 18 U.S.C. section 201(e).<sup>810</sup> One of the five grounds upon which Moore appealed was that the delay in bringing him to trial violated his speedy trial rights.<sup>811</sup>

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addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence. For purposes of such subparagraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial.

805. 645 F.2d at 722.

806. *Id.* at 723. See *supra* text accompanying note 804.

807. Section 3162(a)(2) (1976) provides in pertinent part:

If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant. The defendant shall have the burden of proof of supporting such motion but the Government shall have the burden of going forward with the evidence in connection with any exclusion of time under subparagraph 3161(h)(3).

808. 645 F.2d at 723.

809. 653 F.2d 384 (9th Cir.), *cert. denied*, 454 U.S. 1102 (1981).

810. *Id.* 18 U.S.C. § 201(e) (1981) provides:

Whoever, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for another person or entity in return for being influenced in his testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom—

Shall be fined not more than \$20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

811. 653 F.2d at 387. The facts surrounding Moore's conviction are unusual in nature. While serving a life sentence for murder in Belize (formerly British Honduras), Moore met

Moore relied on the United States Supreme Court's decision in *Barker v. Wingo*<sup>812</sup> for his contention that his sixth amendment rights were violated by the ten and one-half month delay between his arraignment under the first indictment on February 20, 1979 and his trial on

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Dail, a fellow prisoner, who offered to help Moore escape from prison, to pay for his return to the United States, and to pay him \$20,000 if Moore would murder one Hudson, who had testified against one of Dail's business associates. Moore accepted the offer, escaped from the Belize prison, and presented himself to the Drug Enforcement Administration (DEA) in Guatemala City, where he offered to become an informer against Dail. *Id.* at 386.

The DEA accepted Moore's offer and returned him to the United States, where he was to pretend to seek out and kill Hudson while gathering evidence against Dail, who had also returned to the United States. While Moore carried out his instructions, the DEA recorded his telephone conversations with Dail and observed deliveries of weapons by Dail to Moore. Moore ultimately faked Hudson's murder so convincingly that Dail paid him for the murder and sought to have Moore murder other individuals. *Id.*

Shortly thereafter, Moore appeared before a federal grand jury. Approximately one month later he was arrested on a warrant for his extradition to Belize. He was held for forty-five days and then released, as the extradition papers had not arrived from Belize within this period. *Id.* A few days later, one of Dail's associates discovered that Hudson was not dead. To protect Moore from Dail, the Government had Dail arrested and charged with conspiracy to commit murder and interstate transportation of guns to commit a felony. *Id.*

At this point Moore began to consider those who might have an interest in Dail's avoidance of a successful prosecution. Moore and his wife commenced a series of telephone calls to Dail's wife and one of Dail's business associates, offering not to testify in Dail's trial in exchange for a sum of cash. When the DEA learned of these conversations, it confronted Moore, concerned that he would destroy its case against Dail. Moore claimed that he was attempting to incriminate other members of Dail's organization. Unconvinced, the DEA obtained from Moore a written promise not to make any more calls to Dail's wife. *Id.*

Moore violated this agreement and was arrested and charged with violating § 201(e). After his arraignment, the Government offered Moore a plea bargain under which he would plead guilty to one count of violating § 201(e). In return, the Government agreed (1) to request that Belize withdraw its extradition request; (2) not to initiate extradition proceedings upon Moore's release as long as he did not violate any federal or state law; (3) to recommend a sentence of five years; and (4) not to prosecute Moore's wife for her participation in the telephone calls to Dail's wife and associate. To encourage Moore to accept this offer, the Government indicated that, should he reject the offer, the indictment would be dismissed and extradition proceedings instituted, which the Government believed would be successful. Moore rejected the offer, and the Government began the extradition proceedings. *Id.* at 386-87.

However, the Government's effort to penalize Moore with extradition proceedings failed when the district court refused to order Moore's extradition. In response, the Government again arrested Moore and obtained a second indictment against him, charging him with three counts of violating § 201(e), and charging him and his wife with conspiracy to violate § 201(e). The trial resulted in Moore's conviction on the three counts of violating § 201(e) and the acquittal of Moore and his wife on the conspiracy charge. *Id.* at 387.

812. 407 U.S. 514 (1972). The *Barker* Court held that a defendant's constitutional right to a speedy trial cannot be determined by any inflexible rule, but instead can be determined only on an *ad hoc* balancing basis in which the conduct of the prosecution and that of the defendant are weighed. The Court established a balancing test in which the following factors were considered: the length of the delay, the reasons for the delay, the defendant's assertion of his right to a speedy trial, and prejudice to the defendant. *Id.* at 530.

the charges in the second indictment.<sup>813</sup> Applying the first of the *Barker* criteria,<sup>814</sup> length of the delay, the *Moore* court stated that although the delay was of a length sufficient to require scrutiny,<sup>815</sup> it was not sufficiently long to weigh heavily against the Government.<sup>816</sup> The court next addressed the second factor, the reason for the delay, and concluded that it clearly resulted from the Government's decision to seek extradition and, as such, gave the Government no advantage in the trial pursuant to the second indictment. The court observed that the decision to seek extradition was not only understandable, but foreseeable by Moore.<sup>817</sup>

With regard to Moore's assertion of his right to a speedy trial, the third *Barker* factor, the court initially noted that Moore's timely assertion was a factor in his favor. However, the court observed that from a tactical point of view, his assertion of his speedy trial rights had to be viewed as an effort to forestall extradition and therefore did not enhance the persuasiveness of his constitutional argument.<sup>818</sup>

Considering the final *Barker* criterion, the *Moore* court concluded that Moore was not prejudiced by the delay. The only possible source of prejudice to Moore was the fact that an associate of his fellow prisoner Dail, whom Moore telephoned when he attempted to "market"

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813. 653 F.2d at 388. The Ninth Circuit measured the period of delay for the arraignment pursuant to the first indictment and stated that this period would not be reduced for any period of time between the dismissal of the first indictment and the arraignment under the second indictment. *Id.* See *United States v. Henry*, 615 F.2d 1223, 1232-34 & n.13 (9th Cir. 1980).

814. See *supra* note 812.

815. 653 F.2d at 388; see *Barker v. Wingo*, 407 U.S. 514, 530-31 (1972); see also *United States v. Simmons*, 536 F.2d 827, 829-31 (9th Cir.) (six month delay sufficient to trigger inquiry into other factors), *cert. denied*, 429 U.S. 854 (1976).

816. 653 F.2d at 388-89; see *United States v. Henry*, 615 F.2d 1223, 1233 (9th Cir. 1980) (delay of one year does not establish plaintiff's claim); see also *United States v. Santos*, 588 F.2d 1300 (9th Cir.), *cert. denied*, 441 U.S. 906 (1979). In *Santos*, the Ninth Circuit held that appellants were not denied their right to a speedy trial, despite an 11-month pre-indictment delay and despite a delay of 15 months from the date of the first indictment to the date of the trial. *Id.* at 1302-03.

817. 653 F.2d at 389. The *Moore* court remarked that the Government could have avoided the possibility of a speedy trial issue by extending the plea offer prior to any indictment and promptly commencing extradition proceedings in the event that the plea offer was rejected. According to the court, the availability of this expedient provided no basis for refusing to consider Moore's speedy trial argument, but its availability suggested that Moore's argument was not substantial. *Id.*

818. *Id.* The court reasoned that the assertion of speedy trial rights prior to the commencement of extradition proceedings, if it were to be given compelling weight, would require that prosecution pursuant to the first indictment precede the initiation of extradition proceedings. If conviction resulted, this requirement would postpone extradition indefinitely. *Id.*

his testimony, was in a Canadian prison at the time of trial. The court pointed out, however, that Moore had failed to depose that individual although he could have done so.<sup>819</sup> The court also noted the unlikelihood that the associate would have provided exculpatory testimony.<sup>820</sup> The Ninth Circuit thus rejected Moore's argument that his speedy trial rights had been violated by the delay in bringing him to trial.<sup>821</sup>

*United States v. Mills*<sup>822</sup> introduced the question whether the speedy trial rights of prison inmates were violated when they were detained in the prison's Administration Detention Unit (ADU) for ten months pending arraignment for the murder of a fellow inmate.<sup>823</sup> The Ninth Circuit held that their rights were not violated.<sup>824</sup>

The *Mills* court stated that the sixth amendment speedy trial provision applies only when a defendant is "accused."<sup>825</sup> The court stated that this occurs when a formal indictment or information is filed,<sup>826</sup> not when the defendant is segregated by the prison board.<sup>827</sup>

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819. *Id.*

820. *Id.*

821. *Id.* The Ninth Circuit stated that if it were to accept appellant's contentions, it would be required to hold that Moore had a right to be tried under the first indictment prior to any extradition efforts and that the failure of those efforts followed by a delay equal to that in this case precluded further prosecution. Although the court acknowledged that *excessive* delay caused by extradition proceedings might violate an accused's speedy trial rights, it concluded that "[t]he government moved with reasonable alacrity both before and after, as well as during, the extradition proceedings." *Id.* at 388.

822. 641 F.2d 785 (9th Cir.), *cert. denied*, 454 U.S. 902 (1981).

823. *Id.* at 787. Appellees Mills and Pierce were believed to be implicated in the stabbing death of a fellow prison inmate at a federal correctional institution on August 22, 1979. The day after the stabbing, prison officials committed Mills and Pierce to the ADU. The Government indicted Mills and Pierce for murder on March 27, 1980. They remained in segregation until their arraignment on April 21, 1980. Their trial, which originally had been set for June 30, 1980, was continued to July 29, 1980, at their request.

The trial court dismissed the indictments, concluding that the Government had failed to justify its delay in seeking the indictments or in bringing Mills and Pierce to trial and finding that the dimming of the memories of exonerating witnesses, the loss of witnesses, and the deterioration of physical evidence had irreparably prejudiced them. *Id.* at 786-87.

824. *Id.* at 787.

825. *Id.*; see also *United States v. Lovasco*, 431 U.S. 783, 788-89 (1977).

826. 641 F.2d at 787. "[I]t is either a formal indictment or information or else the actual restraints imposed by arrest and holding to answer a criminal charge that engage the particular protections of the speedy trial provision of the Sixth Amendment." *United States v. Marion*, 404 U.S. 307, 320 (1971).

827. 641 F.2d at 787. The court cited *United States v. Blevins*, 593 F.2d 646 (5th Cir. 1979), in which appellant, a federal prisoner, had attacked a fellow inmate and was placed in administrative segregation pending institution of criminal proceedings. The Fifth Circuit stated that his confinement was not an "arrest" or an "accusal" for sixth amendment purposes. *Id.* at 647.

The court followed the decision in *United States v. Clardy*,<sup>828</sup> in which the appellants had been placed in segregated confinement after they had attacked a fellow inmate. On appeal, the appellants had contended that their sixth amendment rights had been violated for failure to commence trial sooner<sup>829</sup> and that they had been subject to *de facto* arrest when placed in segregated confinement after the attack. Stating that segregation is not an "arrest" for speedy trial purposes, the court held that the factors indicating *de facto* arrest were generally absent,<sup>830</sup> and that the appellants' speedy trial rights had not come into play until they were indicted on April 1, 1975.<sup>831</sup>

The *Mills* court followed the holding of *Clardy*.<sup>832</sup> It noted that the Bureau of Prisons had requested the appellees' detention in the ADU. The detention orders stated that the appellees were to be investigated for violations of prison regulations and possibly tried for a criminal act, and that their continued presence in the general prison population threatened the life and property of those in the institution and the security of the prison itself.<sup>833</sup> The court held that there was no arrest or accusation until the appellees were indicted on March 27, 1980.<sup>834</sup> For purposes of their speedy trial rights, therefore, the delay was only three months and three days.<sup>835</sup>

### E. The Right to a Jury Trial

The sixth amendment guarantees an accused the right to a jury

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828. 540 F.2d 439 (9th Cir.), *cert. denied*, 429 U.S. 963 (1976).

829. *Id.* at 441. The stabbing occurred on October 27, 1974. Appellants were indicted on April 1, 1975, and arraigned on April 18, 1975. The trial commenced July 28, 1975. *Id.*

830. *Id.*

The prison discipline did not focus public obloquy upon appellants, did not disrupt their "employment" or drain appellants' financial resources. In short, it was not a public act with public ramifications, but a private act. Actual physical restraint may have increased and free association diminished, but unless we were to say that imprisonment *ipso facto* is a continuing arrest, these criteria bear little weight in the peculiar context of a penal institution where the curtailment of liberty is the general rule not the exception.

*Id.*

831. *Id.*

832. 641 F.2d at 787.

833. *Id.*

834. *Id.*

835. *Id.* Three months and three days elapsed between March 27 and June 30, 1980, the date for which the trial was set prior to the granting of appellees' request for a continuance to July 29, 1980.

The *Mills* court agreed with the Fifth Circuit that the *ad hoc* balancing test of *Barker* did not apply to the pre-accusation delay about which appellees complained. *Id.* at 787. See also *United States v. Blevins*, 593 F.2d 646, 647 (5th Cir. 1979).



trial in all criminal prosecutions.<sup>836</sup> However, this provision has been interpreted in light of the common law rule which requires a jury for "serious" but not "petty" offenses.<sup>837</sup> The characterization of an offense as "petty" or "serious" is usually based upon the nature of the offense, and courts have often relied upon the maximum authorized penalty for an offense as an objective indication of the seriousness of each particular crime.<sup>838</sup>

In *Baldwin v. New York*,<sup>839</sup> the Supreme Court concluded that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized."<sup>840</sup> However, in a series of cases involving criminal contempt, the Court looked to the punishment actually imposed to determine whether the defendant had a right to a jury trial.<sup>841</sup> In addition, the Court has left open the possibility that an offense may be serious enough to require trial by jury, notwithstanding an assigned penalty which would otherwise classify the offense as petty.<sup>842</sup>

In 1981, the Ninth Circuit addressed a defendant's right to a jury trial in *United States v. Craner*.<sup>843</sup> Craner had been convicted at a bench trial of driving under the influence of alcohol in a national park.<sup>844</sup> On appeal, he contended that the district court had erred in denying his motion for a jury trial.<sup>845</sup> Although Craner's sentence was only probation and attendance at traffic school, the offense carried a

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836. U.S. CONST. amend. VI. In cases involving the federal judiciary, Article III provides: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury." U.S. CONST. art. III, § 2, cl. 3.

837. See, e.g., *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968) (battery punishable by two year sentence considered a serious crime entitling defendants to jury trial); *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930) (right to jury trial guaranteed in case of reckless driving since offense was *malum in se* and of a serious character); *Callan v. Wilson*, 127 U.S. 540, 551 (1888) (conspiracy to prevent another from pursuing lawful avocation considered a serious offense entitling defendant to jury trial).

838. *Duncan v. Louisiana*, 391 U.S. at 161-62. See, e.g., *Bloom v. Illinois*, 391 U.S. 194, 210 (1968) (seriousness of crime should determine assessment of penalty).

839. 399 U.S. 66 (1970) (plurality opinion).

840. *Id.* at 69.

841. See *Muniz v. Hoffman*, 422 U.S. 454, 476-77 (1975) (no jury trial under federal statute for criminal contempt); *Codispoti v. Pennsylvania*, 418 U.S. 506, 511 (1974) (right to jury trial mandated if sentences imposed aggregate to more than six months); *Taylor v. Hayes*, 418 U.S. 488, 495 (1974) (no absolute right to jury trial in cases of criminal contempt); *Cheff v. Schnackenberg*, 384 U.S. 373, 379-80 (1966) (plurality opinion) (no imposition of sentences exceeding six months absent jury trial or waiver thereof).

842. *Baldwin v. New York*, 399 U.S. 66, 70 (1970).

843. 652 F.2d 23 (9th Cir. 1981).

844. *Id.* at 24.

845. *Id.*

maximum authorized penalty of six months' imprisonment or a \$500.00 fine, or both, plus payment of costs.<sup>846</sup> Thus, Craner argued that the offense was serious enough to warrant the constitutional guarantee of trial by jury.<sup>847</sup>

The *Craner* court observed that "the maximum penalty for an offense is usually more important than any other criterion used in characterizing the offense as serious or petty."<sup>848</sup> The court justified this conclusion by reference to the general acceptance of penalties as indicators of the public's assessment of the gravity of a particular offense.<sup>849</sup> However, the court also recognized that the maximum penalty is not the only criterion to be considered in characterizing an offense as serious or petty.<sup>850</sup>

The court noted that because the maximum penalty in *Craner* had been set by the Secretary of the Interior, rather than by Congress, it could not be considered a legislative reflection of the public's assessment of the gravity of driving under the influence of alcohol in a national park. Rather, the penalty authorized by the Secretary was the most severe penalty possible within the Secretary's congressionally limited power.<sup>851</sup>

The court indicated that the gravity of an offense could also be gauged by the potential future legal consequences of a conviction.<sup>852</sup> Accordingly, the court found merit in Craner's argument that notwithstanding the sentence imposed for the violation, he also faced the possibility of losing his California driver's license. The court found this collateral consequence, whether actually imposed or not, to be a relevant indicator of the gravity of the offense.<sup>853</sup> Relying upon precedent which held that the analogous offense of reckless driving was a serious offense requiring the constitutional guarantee of trial by jury,<sup>854</sup> the

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846. *Id.*

847. *Id.*

848. *Id.* at 25.

849. *Id.*

850. *Id.* at 25. The court noted that "[a]n offense is not 'serious' because it is severely punished; it is severely punished because it is 'serious.'" *Id.* at 24.

851. *Id.* at 25. The court noted that the penalty for drunk driving was the same as that imposed for other offenses, including climbing Mount Rushmore and digging for bait in a national park. The court drew a distinction between the Secretary's "indiscriminate authorization of this penalty" and a "considered legislative judgment of the gravity of the offense of DUI." *Id.*

852. *Id.* at 26.

853. *Id.*

854. *Id.* (citing *District of Columbia v. Colts*, 282 U.S. 63, 73 (1930) (reckless driving found to be serious in that it was both indictable at common law and *malum in se*)). The court rejected the Government's contention that *Colts* had been superseded, noting that the

court reasoned that the comparable seriousness of driving under the influence of alcohol also required trial by jury.<sup>855</sup>

In addition, the court looked to the standards adopted by those states within the Ninth Circuit,<sup>856</sup> and noted that at least seven required that a defendant accused of driving under the influence be accorded the right to jury trial.<sup>857</sup> This survey was characterized as an "objective gauge of the common perception of the gravity of the offense."<sup>858</sup>

The court concluded its analysis by balancing the relative values involved in guaranteeing a right to jury trial against the administrative convenience of summary proceedings.<sup>859</sup> Noting that federal prosecutions for driving under the influence of alcohol were rare, the court characterized the administrative benefits resulting from summary proceedings as relatively slight.<sup>860</sup> Therefore, constitutionally, the benefits did not "outweigh defendants' interests in being tried by their peers if they so choose."<sup>861</sup>

### III. PRETRIAL PROCEEDINGS

#### A. *Indictments*

##### 1. Essential elements

Rule 7(c)(1) of the Federal Rules of Criminal Procedure requires that an "indictment . . . be a plain, concise and written statement of the essential facts constituting the offense charged."<sup>862</sup> The Ninth Circuit has recently considered cases in which it was claimed that indictments are fatally defective because they failed to allege essential elements of the charged offenses. Particularly pertinent to these cases is the Supreme Court's holding that "[c]onvictions are no longer [to be] reversed because of minor and technical deficiencies which [do] not prejudice the accused,"<sup>863</sup> and the Court's enumeration of certain crite-

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Supreme Court has not repudiated *Colts* even though presented with many opportunities to do so. 652 F.2d at 26.

855. 652 F.2d at 26.

856. *Id.* at 27.

857. The court observed that the following states had provided for a right to jury trial in cases of driving under the influence of alcohol: Alaska, Arizona, California, Hawaii, Idaho, Montana, Oregon, and Washington. It further noted that only five states denied such defendants the right to a jury trial. *Id.* at 27 n.5.

858. *Id.* at 27.

859. *Id.*

860. *Id.*

861. *Id.*

862. FED. R. CRIM. P. 7(c)(1).

863. *Smith v. United States*, 360 U.S. 1, 9 (1959).

ria for evaluating a challenged indictment:

These criteria are, first whether the indictment "contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet," and, secondly, "in case any other proceedings are taken against him for a similar offence, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."<sup>864</sup>

The Ninth Circuit considered these criteria in *United States v. Ellsworth*.<sup>865</sup> Ellsworth appealed his conviction for assaulting a federal officer with a deadly weapon in violation of 18 U.S.C. sections 111<sup>866</sup> and 1114.<sup>867</sup> He argued that the indictment against him was fatally defective because it failed to allege that the officer's official duties consisted of investigative, inspection, or law enforcement functions.<sup>868</sup>

The Ninth Circuit, however, held that because the crux of the alleged crime was the assault, not the particulars of the victim's job description, the indictment had sufficiently advised the defendant of the charge against him.<sup>869</sup> The court stated that because the defendant had raised the issue of the indictment's insufficiency during post trial

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864. *Russell v. United States*, 369 U.S. 749, 763-64 (1962) (quoting *Hagner v. United States*, 285 U.S. 427, 431 (1932) (citations omitted)). The defendant had been summoned to testify before a congressional committee and was later convicted of violating 2 U.S.C. § 192 (1938) (refusing to answer "any question pertinent to the question under inquiry"). The Court held that the indictment's failure to identify the question under the subcommittee's inquiry constituted a failure to meet the requirement that the defendant be sufficiently apprised of the charges against which he must be prepared to defend. *Id.* at 764.

865. 647 F.2d 957 (9th Cir. 1981). The Ninth Circuit adopted the Supreme Court's criteria for evaluating a challenged indictment in *United States v. Pheaster*, 544 F.2d 353, 363 (9th Cir. 1976).

866. 18 U.S.C. § 111 (1976) proscribes the forcible assault, resistance, impudence, intimidation, or interference with any person designated in 18 U.S.C. § 1114 (Supp. III 1979).

867. 18 U.S.C. § 1114 (Supp. III 1979) designates the persons referred to in 18 U.S.C. § 111 as those officers or employees of the Department of the Interior who have either been assigned to perform investigative, inspection, or law enforcement functions or to enforce any act of Congress for the protection, preservation, or restoration of game and other wild birds and animals.

868. 647 F.2d at 962. The indictment charged:

That on or about the 15th day of October, 1979, Anchorage, Alaska, in the District of Alaska, PHILLIP JOHN ELLSWORTH, unlawfully, wilfully and by means of a dangerous weapon, . . . did forcibly assault, resist, oppose, impede, intimidate and interfere with Jerry Lee Cox, a Petroleum Engineer Technician of the Conservation Division of the United States Geological Service of the Department of the Interior, while he was engaged in the performance of his official duties, all in violation of Title 18, United States Code, Section 111 and 1114.

*Id.* at 958.

869. *Id.* at 962 (citing *United States v. Tijerina*, 407 F.2d 349, 353 (10th Cir. 1969) (indictment for assaulting forest ranger and alleging time, place, identity of victim, his official

proceedings, the indictment required a liberal construction.<sup>870</sup> It concluded that even if there were a missing statutory element, it could easily be implied from the indictment's actual language.<sup>871</sup>

In *United States v. Tavelman*,<sup>872</sup> the defendants appealed their convictions for two offenses: (1) conspiracy to possess cocaine for distribution and (2) interstate travel in furtherance of the conspiracy.<sup>873</sup> They argued that their indictments under Count I for conspiracy were fatally defective because of the omission of either a substantive count of cocaine possession or the absence of any overt acts committed in furtherance of the conspiracy.<sup>874</sup> Furthermore, the defendants claimed that their indictments under Count II for interstate travel were fatally defective for omitting overt acts committed in furtherance of the unlawful intent to distribute cocaine.<sup>875</sup>

The Ninth Circuit began its examination of the indictments under Count I by emphasizing the Supreme Court's holding that a statement of the elements of an offense under a conspiracy count does not require as much detail as under a substantive count.<sup>876</sup> The court adopted the Fifth Circuit's position that an indictment for conspiracy to distribute drugs requires only allegations of the existence of the conspiracy, the time during which the conspiracy was operative, and the statute violated.<sup>877</sup> The court concluded that, despite the absence of an allegation of an overt act committed in furtherance of the conspiracy, the indict-

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capacity, and performance of official duties when assaulted was not defective for omitting that ranger was enforcing congressional statute protecting game, wild birds, and animals)).

870. 647 F.2d at 962 (citing *United States v. Pheaster*, 544 F.2d 353, 363 (9th Cir. 1976)).

871. 647 F.2d at 962 (citing *Kaneshiro v. United States*, 445 F.2d 1266, 1269 (9th Cir. 1971)). The defendants in *Kaneshiro* were charged with violating a statute prohibiting an unlicensed manufacturer or dealer from transporting any firearm in interstate or foreign commerce. The indictment, however, failed to allege that the defendants were manufacturers or dealers. The court held that the missing statutory elements could be implied because the statute had been expressly cited, and the allegation that firearms were unlawfully transported suggested that the transaction was a business venture necessarily involving a dealer. *Id.* at 1269.

872. 650 F.2d 1133 (9th Cir. 1981).

873. *Id.* at 1135.

874. *Id.* at 1137. Count I of the indictments charged that, between July 12 and July 20, 1979, the defendants had conspired to possess cocaine with an intent to distribute in violation of 21 U.S.C. §§ 841(a)(1), 846 (1976). 650 F.2d at 1137.

875. 650 F.2d at 1138. Count II of the indictments charged that, on or about July 20, 1979, the defendants traveled from Los Angeles to Reno with an intent to distribute cocaine (in violation of 21 U.S.C. § 841(a)(1) (1976)) and that, on the same day, they committed acts facilitating that unlawful activity in violation of 18 U.S.C. § 1952(a)(3) (1976). 650 F.2d at 1138.

876. 650 F.2d at 1137 (citing *Wong Tai v. United States*, 273 U.S. 77, 81 (1927)).

877. 650 F.2d at 1137 (citing *United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978)).

ments under Count I were sufficient.<sup>878</sup>

The Ninth Circuit then reviewed the essential elements of the offense charged under Count II: (1) use of interstate commerce or an interstate facility, (2) with intent to promote unlawful activity and (3) a subsequent overt act in furtherance of that unlawful activity.<sup>879</sup> The court concluded that because the indictments contained all of the above elements, they were sufficient under Count II.<sup>880</sup>

In *United States v. Dufur*,<sup>881</sup> the defendant appealed his conviction for the first-degree murder of a customs officer. He argued that the indictment was fatally defective because it did not allege the time and place of the victim's death with sufficient specificity to meet the Supreme Court's requirements in *Ball v. United States*.<sup>882</sup> The *Ball* Court reversed a murder conviction because the indictment failed to allege the place of death with sufficient specificity.<sup>883</sup> It held that the indictment must state the "particulars of time and place, that the accused may be enabled to prepare his defence and avail himself of his acquittal or conviction against any further prosecution for the same cause."<sup>884</sup> After considering *Ball*, the Ninth Circuit found that the *Dufur* indictment followed Form 1 of the Federal Rules of Criminal Procedure.<sup>885</sup> The court concluded that the time and place of death were stated with sufficient certainty to satisfy the requirements of

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878. 650 F.2d at 1137. The defendants had relied on *United States v. Cecil*, 608 F.2d 1294, 1296-97 (9th Cir. 1979) (per curiam), where the court held a similar indictment to be invalid. The *Cecil* court, however, had determined the indictment to be invalid because it had failed to place the alleged conspiracies within any time frame. The *Tavelman* court declared *Cecil* inapposite. 650 F.2d at 1137.

879. The Ninth Circuit established that these three elements were essential to charging a violation of 18 U.S.C. § 1952(a)(3) (1976) in *United States v. Polizzi*, 500 F.2d 856, 897 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975). The Third Circuit subsequently compared these elements to those alleged in an indictment for the same charge. *United States v. Wander*, 601 F.2d 1251 (3d Cir. 1979). The court concluded that the *Wander* indictment was insufficient for failing to mention the occurrence of an overt act committed in furtherance of the unlawful activity. *Id.* at 1258-59.

880. 650 F.2d at 1138.

881. 648 F.2d 512 (9th Cir. 1980).

882. 140 U.S. 118 (1891). The *Dufur* indictment charged that "on or about May 24, 1979, at Lynden, within the Western District of Washington, ARTIE RAY BAKER a/k/a MICHAEL JOSEPH ARRINGTON with premeditation and by means of shooting, murdered Kenneth Ward." 648 F.2d at 514.

883. 140 U.S. at 136. The *Ball* indictment charged that on June 26, 1889, in Pickens County, in Chickasaw Nation, in the Indian Territory, the defendant assaulted the victim with a loaded gun and inflicted mortal wounds by the discharge of its contents, "of which mortal wounds the . . . [victim] did languish, and languishing died." *Id.* at 121-22.

884. *Id.* at 136.

885. 648 F.2d at 514.

*Ball*.<sup>886</sup>

Similarly, in *United States v. Davis*,<sup>887</sup> the defendant challenged his conviction for involvement in a continuing criminal enterprise, arguing that the indictment against him under this particular count was fatally defective for failing to specify the property, which would be subject to forfeiture, that he had allegedly obtained from the criminal enterprise.<sup>888</sup> The Ninth Circuit held, however, that because the Government had advised the court and Davis before trial that no attempt would be made to seek a forfeiture of any property upon conviction, it was unnecessary to describe any specific interest in the property.<sup>889</sup>

In *United States v. Thordarson*,<sup>890</sup> the Government appealed from the dismissal of an indictment charging the defendant union officials with five counts of misusing union funds to destroy an employer's trucks. The Government argued that the defendant had violated section 501(c) of the Landrum-Griffith Act, which "prohibits a union officer or employee from converting union funds to his own use, or to the use of another."<sup>891</sup> The district court dismissed the indictment for a failure to allege essential elements of a section 501(c) offense: (1) a fraudulent intent to deprive the union of its funds and (2) either a lack of union authorization or an absence of a good faith belief in benefit to the union from the use of the funds.<sup>892</sup>

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886. *Id.* Because there is no appreciable difference between the *Dufur* and *Ball* indictments, it seems doubtful that the *Dufur* indictment actually does satisfy the requirements of *Ball*. However, the *Ball* Court seemed to base its decision on the question of jurisdiction ("The accused is entitled to be informed of the nature and cause of the accusation against him, and jurisdiction should not be exercised when there is doubt as to the authority to exercise it."). 140 U.S. at 136. Therefore, the better justification for the Ninth Circuit's decision in *Dufur* is its statement that it may no longer be necessary to allege the place of death in an indictment. After the Supreme Court had decided *Ball*, Congress declared jurisdiction over a murder conviction in the district where the injury had been inflicted rather than where death occurred. See 18 U.S.C. § 3236 (1976). Because the place of death no longer determines jurisdiction, it may no longer be an essential element of the offense of murder. The *Dufur* court found it unnecessary to decide this issue as it found the indictment "sufficiently specific even if such averment is still required." 648 F.2d at 514 n.1. The District of Columbia Circuit has, however, held that an indictment need not allege the place of death. *Bostic v. Rives*, 107 F.2d 649, 651 (D.C. Cir. 1939).

887. 663 F.2d 824 (9th Cir. 1981).

888. *Id.* at 833.

889. *Id.*

890. 646 F.2d 1323 (9th Cir. 1981).

891. *Id.* at 1325; 29 U.S.C. § 501(c) (1976).

892. 646 F.2d at 1332. The indictment charged under counts six, nine, and ten that the defendants "did embezzle, steal, and unlawfully and wilfully abstract and convert to their own use and the use of another" the union's funds. *Id.* at 1337.

The Ninth Circuit agreed with the district court that fraudulent intent is an essential element of a section 501(c) offense.<sup>893</sup> However, it held that the word "wilfully," appearing in three of the counts, was sufficient to allege the requisite criminal intent when read in the context of the entire statutory language of the indictment.<sup>894</sup> The court further held that although the language in the remaining two counts was less complete, it adequately informed the defendants of the charges against them.<sup>895</sup>

The court implicitly acknowledged that the indictment did not allege either a lack of union authorization or an absence of a good faith belief in benefit to the union under any interpretation.<sup>896</sup> However, after a lengthy analysis of the cases construing section 501(c), it concluded that while a lack of authorization or an absence of belief in benefit might be important factors in determining fraudulent intent, neither is an essential element of a section 501(c) offense that must be included in an indictment. For these reasons, the Ninth Circuit reversed the district court's dismissal and reinstated the indictment.<sup>897</sup>

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893. *Id.* at 1334 (citing *United States v. Andreen*, 628 F.2d 1236, 1241 (9th Cir. 1980); *United States v. Marolda*, 615 F.2d 867, 872-73 (9th Cir. 1980) (Larson, J., concurring); *United States v. Silverman*, 430 F.2d 106, 126-27 (2d Cir.), *modified on other grounds*, 439 F.2d 1198 (1970) (per curiam), *cert. denied*, 402 U.S. 953 (1971)). In these cases, both the Ninth and Second Circuits interpreted section 501(c) as stating a "larceny-type" offense, thereby leading the *Thordarson* court to conclude that a specific criminal intent to deprive the union of its funds is required for a section 501(c) violation. 646 F.2d at 1336-37. The court declined to follow *United States v. Boyle*, 482 F.2d 755, 764 (D.C. Cir.), *cert. denied*, 414 U.S. 1076 (1973), where the District of Columbia Circuit held that when union funds are knowingly transferred for an unlawful use, the transfer constitutes a *per se* violation of section 501(c). 646 F.2d at 1337 n.25. The *Thordarson* court stated that such a rule improperly presumes the requisite criminal intent and converts a "larceny-type" statute into one which criminalizes union expenditures for prohibited purposes. *Id.* at 1333.

894. 646 F.2d at 1337. In *United States v. Illinois Cent. R.R.*, 303 U.S. 239, 242 (1938), the Supreme Court defined "wilfully" as meaning "with evil purpose, criminal intent or the like" when used to describe offenses involving moral turpitude. Furthermore, the First and Eighth Circuits have held that language like that used in counts six, nine, and ten is sufficient to allege criminal intent under section 501(c). *See, e.g., Colella v. United States*, 360 F.2d 792, 798-99 (1st Cir.), *cert. denied*, 385 U.S. 829 (1966); *Doyle v. United States*, 318 F.2d 419, 420-22 (8th Cir. 1963).

895. 646 F.2d at 1337. The court noted that the district court may have dismissed the indictment not because it failed to allege fraudulent intent, but because the court doubted that fraudulent intent could be proven at trial. The court stated that if this was the district court's reasoning, it was in error. *Id.* at 1337 n.25.

896. *Id.* at 1337.

897. *Id.* at 1331-37. The court agreed with Judge Larson's concurring opinion in *United States v. Marolda*, 615 F.2d 867, 872-73 (9th Cir. 1980), that neither lack of authorization nor an absence of belief in benefit to the union is an essential element of a section 501(c) violation. It stated that because section 501(c) is a "larceny-type" statute, the only essential elements are fraudulent intent and conversion. 646 F.2d at 1334-35.



The Ninth Circuit's evaluation of allegedly defective indictments appears to follow that of the Supreme Court.<sup>898</sup> Rather than rigidly requiring specific language in an indictment, the Ninth Circuit examines whether the indictment has served its basic purposes of apprising the defendant of the charges against him and of protecting him from double jeopardy. Although an indictment must state the essential elements of an offense, the district court is allowed some flexibility in determining which elements are essential (*Dufur, Davis, and Thordarson*). The ability of the court to assume the existence of facts not expressly stated (*Ellsworth and Tavelman*), or to ascribe certain logical meanings to those that are stated (*Thordarson*), ensures that essentially adequate indictments will not be dismissed for purely technical reasons.

## 2. Jurisdiction unlawfully obtained

The *Ker-Frisbie* doctrine provides that an indictment or conviction is valid even though the defendant may have been abducted into the jurisdiction of the United States.<sup>899</sup> The doctrine has been followed by almost every circuit;<sup>900</sup> however, the Second Circuit created an exception to the *Ker-Frisbie* doctrine in *United States v. Toscanino*.<sup>901</sup> Toscanino had been tortured and drugged in Brazil by American agents, then kidnapped and returned to the United States. The Second Circuit held that such an outrageous invasion of Toscanino's constitutional rights necessitated dismissal of the indictment.<sup>902</sup>

The Ninth Circuit recently considered the application of the outrageous conduct exception in *United States v. Fielding*.<sup>903</sup> Fielding had been kidnapped and tortured in Peru before being abducted to the United States for prosecution under various drug related charges. He alleged that United States agents had participated in his kidnapping

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898. See *supra* note 864 and accompanying text.

899. *Frisbie v. Collins*, 342 U.S. 519 (1952) (no constitutional requirement that court permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will); *Ker v. Illinois*, 119 U.S. 436 (1886) (forcible removal of United States citizen from foreign country for trial in state court not a violation of due process).

900. *United States v. Lovato*, 520 F.2d 1270 (9th Cir.), *cert. denied*, 421 U.S. 1001 (1975); *United States v. Lira*, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975); *United States v. Quesada*, 512 F.2d 1043 (5th Cir. 1975); *Klink v. Looney*, 262 F.2d 119 (10th Cir. 1958); *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948), *cert. denied*, 336 U.S. 918 (1949); *Robinson v. United States*, 144 F.2d 392 (6th Cir.), *aff'd*, 324 U.S. 282 (1944); *Sheehan v. Huff*, 142 F.2d 81 (D.C. Cir.), *cert. denied*, 322 U.S. 764 (1944); *United States v. Marzano*, 388 F. Supp. 906 (D.C. Ill. 1975); *United States v. Best*, 76 F. Supp. 138 (D.C. Mass. 1948).

901. 500 F.2d 267 (2d. Cir. 1974).

902. *Id.* at 275-76.

903. 645 F.2d 719 (9th Cir. 1981) (*per curiam*).

and torture, and that the outrageous conduct exception to the *Ker-Frisbie* doctrine therefore applied to his case.<sup>904</sup>

The Ninth Circuit emphasized the limitations placed upon the outrageous conduct rule since *Toscanino*. For example, the Second Circuit has held that the outrageous conduct exception does not apply when the defendant's deprivation was no "greater than that which he would have endured through lawful extradition,"<sup>905</sup> or when there was no proof that the United States had been involved in the actual arrest and detention.<sup>906</sup> The Ninth Circuit has also held that the outrageous conduct exception does not apply unless the defendant "makes a strong showing of grossly cruel and unusual barbarities inflicted upon him by persons who can be characterized as paid agents of the United States."<sup>907</sup>

After examining Fielding's evidence, the court concluded that there was no proof that the United States had participated directly in any part of the kidnapping and torture.<sup>908</sup> While there was some evidence that Fielding had advised embassy representatives of his treatment, there was no proof that they had failed to help alleviate the situation. The Ninth Circuit thus reaffirmed the rule that absent cogent proof that the United States itself had engaged in the outrageous conduct, the *Ker-Frisbie* doctrine applied, and the indictment was held to be valid.<sup>909</sup>

The Ninth Circuit's decision in *Fielding* reflects its reluctance to start a new trend in the area of due process. However, as stated by the court in *Toscanino*,<sup>910</sup> the concept of due process had already been ex-

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904. *Id.* at 723.

905. *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 66 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975). In *Lujan*, the defendant, a resident of Argentina, had been abducted from Bolivia and transported to the United States. The Second Circuit held that because there was no evidence that he had been subjected to torture or custodial interrogation, or that either Argentina or Bolivia had protested his abduction, the outrageous conduct rule did not apply. *Id.*

906. *United States v. Lira*, 515 F.2d 68, 70-71 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975). In *Lira*, the defendant had been tortured by Chilean police before being forcibly expelled from Chile at the United States' request. The Second Circuit held that because there was no showing that the United States itself had participated in the torture, the outrageous conduct rule did not apply. *Id.* at 71.

907. *United States v. Lovato*, 520 F.2d 1270, 1271-72 (9th Cir.), *cert. denied*, 423 U.S. 985 (1975). In *Lovato*, the Ninth Circuit held that there was no *Toscanino* showing, even though the defendant had been forcibly expelled from Mexico into the custody of waiting United States officers. *Id.*

908. 645 F.2d at 723-24.

909. *Id.*

910. 500 F.2d at 273.

panded by the Supreme Court in *Rochin v. California*<sup>911</sup> and *Mapp v. Ohio*.<sup>912</sup> Neither of those cases involved an application of the *Ker-Frisbie* doctrine, but they did involve situations in which the Court invalidated convictions resting on evidence obtained from police brutality (*Rochin*)<sup>913</sup> and from an illegal search and seizure (*Mapp*).<sup>914</sup>

The Second Circuit has distinguished *Toscanino* and *Rochin* from cases involving an absence of physical cruelty to the defendant.<sup>915</sup> However, whether or not physical cruelty has been inflicted upon the defendant, an obvious similarity still exists between the illegal abduction of a defendant and evidence obtained as a result of an illegal search and seizure. The Supreme Court has stated that the exclusionary rule serves a dual purpose: deterring the police from violating an accused's constitutional rights<sup>916</sup> and preserving judicial integrity.<sup>917</sup> Exercising jurisdiction over a defendant who has been kidnapped by United States agents is plainly inconsistent with both of these purposes and should be discouraged by the courts just as they discourage the use of illegally obtained evidence.

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911. 342 U.S. 165 (1952).

912. 367 U.S. 642 (1961).

913. The *Rochin* Court set aside the defendant's conviction of drug offenses because of the method used by the police to obtain incriminating evidence. 342 U.S. at 172-74. The evidence, two morphine capsules, had been swallowed by the defendant to conceal it from the police. The police took the defendant, handcuffed, to a hospital where they persuaded a doctor to force emetic solution through a tube into his stomach. The defendant vomited the capsules, and the police submitted them as evidence at his trial. *Id.* at 166.

914. Although the exclusionary rule was originally invoked to bar illegally obtained evidence from federal prosecutions, *Weeks v. United States*, 232 U.S. 383 (1914), the *Mapp* decision was the first to extend the exclusionary rule to state prosecutions. 367 U.S. at 654-55.

915. See *United States ex rel. Lujan v. Gengler*, 510 F.2d 62, 66 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975).

916. *Elkins v. United States*, 364 U.S. 206, 217 (1960).

917. *Id.* at 222-23. The *Elkins* Court included in its discussion of "the imperative of judicial integrity" a statement made by Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438 (1928):

If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

*Id.* at 485 (Brandeis, J., dissenting).

Since *Elkins*, however, the Court has stressed police deterrence over the preservation of judicial integrity as a justification for the exclusionary rule: "The primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights." *Stone v. Powell*, 428 U.S. 465, 486 (1976). "While courts . . . must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence." *Id.* at 487.

When defendants have been abducted and tortured by foreign agents, the Second Circuit has reasoned that divesting United States courts of jurisdiction would not deter misconduct by United States officers.<sup>918</sup> This rationale, however, applies only when defendants have been abducted solely on the initiative of foreign agents.<sup>919</sup> Conversely, where requests to arrest and expel originate with the United States, the refusal to exercise jurisdiction over defendants who have been mistreated by foreign agents might encourage United States officials to pursue alternative means of securing such defendants. Furthermore, even if such "requests" do not constitute "police misconduct," refusing to exercise jurisdiction under these circumstances would serve to protect the integrity of the court.

Extradition alone protects against the abuses that recur in obtaining a defendant's presence from a foreign jurisdiction. When abduction, rather than extradition, procures the defendant, and United States agents act directly in the abduction or instigate an abduction by foreign agents, existing concepts of due process should be extended to require dismissal of the attending indictment.

### 3. Time limitations

An indictment must be filed within the time prescribed by the statute of limitations applicable to the particular offense charged. Such statutes specify "a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced."<sup>920</sup> An indictment is clearly invalid when filed after the expiration of the applicable limitation period. However, questions may arise concerning the interpretation of the applicable statute involved. In *United States v. Akmakjian*,<sup>921</sup> the Ninth Circuit interpreted the statute of limitations for income tax evasion to require the Government to obtain an indictment within six years after the commission of the offense.<sup>922</sup> However, if a complaint is instituted before a commissioner of the United States within six years, the time to obtain an indictment will be extended until nine months after the date of the complaint's institution.<sup>923</sup>

In *Akmajian*, the Government filed a complaint against the defendant on April 15, 1975. The complaint charged the defendant with

918. *United States v. Lira*, 515 F.2d 68, 71 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975).

919. *See, e.g., United States v. Lovato*, 520 F.2d 1270 (9th Cir.), *cert. denied*, 423 U.S. 985 (1975).

920. *United States v. Marion*, 404 U.S. 307, 322 (1971).

921. 647 F.2d 12 (9th Cir. 1981) (*per curiam*).

922. *Id.* at 13.

923. 26 U.S.C. § 6531 (1976).

income tax evasion for the calendar year of 1968. For the purpose of the statute of limitations, the court deemed the commission of the alleged offense to have occurred on April 15, 1969.<sup>924</sup> On May 6, 1975, the complaint was dismissed pursuant to the Government's motion that the ends of public justice did not require prosecution.<sup>925</sup>

On January 12, 1976, Akmakjian was indicted for six tax offenses, count three of which was the 1969 offense. Akmakjian moved to dismiss this count as barred by the statute of limitations.<sup>926</sup> Before the hearing on the motion, however, Akmakjian entered into a plea agreement with the Government whereby he pleaded guilty to count three, and the remaining counts were dismissed. Before accepting the guilty plea, the district court determined that Akmakjian was expressly waiving the statute of limitations defense.<sup>927</sup> Four years later, Akmakjian moved to set aside the guilty plea count three on the ground that the statute of limitations barred his indictment.

Because Akmakjian was indicted six years, eight months, and twenty-seven days after his alleged tax evasion, the indictment against him could be timely only if the filing of the Government's initial complaint triggered the nine-month extension of the limitation period.<sup>928</sup> The Ninth Circuit approached this issue by examining the Supreme Court's opinion in *Jaben v. United States*.<sup>929</sup> The *Jaben* Court held that only a complaint establishing probable cause to believe that an offense has been committed activates the nine-month extension of the statute of limitations.<sup>930</sup> The Court reasoned that the statutory purpose of the nine-month extension provision:

is to afford the Government an opportunity to indict criminal tax offenders in the event that a grand jury is not in session at the end of the normal limitation period . . . . Clearly the statute was not meant to grant the Government greater time in which to make its case (a result which could have been accomplished simply by making the normal period of limitation six years and nine months) . . . .<sup>931</sup>

The Court concluded that a complaint that states only the essential

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924. 647 F.2d at 13 n.2.

925. *Id.* at 13.

926. *Id.*

927. *Id.*

928. *Id.*

929. 381 U.S. 214 (1965).

930. *Id.* at 220.

931. *Id.* at 219.

facts constituting the offense,<sup>932</sup> but does not establish probable cause, is insufficient to trigger the nine-month extension of the limitation period.<sup>933</sup>

The *Akmajian* court therefore held that a complaint dismissed before the indictment is returned fails to satisfy the probable cause requirement that activates the nine-month extension.<sup>934</sup> However, because *Akmajian* had expressly waived the statute of limitation defense, the court affirmed his conviction despite the untimely indictment.<sup>935</sup>

Questions involving the interpretation of statutes of limitations are not the only problems arising from imposing time limitations upon an indictment. The Supreme Court has held it necessary to dismiss an indictment where delay in its filing although within the statute of limitations, has "caused substantial prejudice to [the defendant's] rights to a fair trial"<sup>936</sup> and "was an intentional device to gain tactical advantage over the accused."<sup>937</sup> Therefore, a court must not only determine whether a defendant has suffered actual prejudice, but must also determine the reasons for the pre-indictment delay.<sup>938</sup>

The Ninth Circuit has not followed the Court's requirement that the delay be intentional and improper.<sup>939</sup> Instead, it has enumerated three factors to be balanced in evaluating a delayed indictment: (1) the actual prejudice caused to the defendant; (2) the length of the delay; and (3) the reasons for the delay.<sup>940</sup> The Ninth Circuit has held, how-

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932. FED. R. CRIM. P. 3 defines a complaint as simply "a written statement of the essential facts constituting the offense charged."

933. 381 U.S. at 220.

934. 647 F.2d at 14.

935. *Id.* (citing *Biddinger v. Commissioner*, 245 U.S. 128, 135 (1917)).

936. *United States v. Marion*, 404 U.S. 307, 324 (1971) (emphasis added).

937. The *Marion* defendants argued that their indictment should be dismissed because of a three year pre-indictment delay that was "bound to be" prejudicial to their defense. *Id.* at 313. The Court refused to dismiss the indictment, however, because the defendants had not asserted any *specific* prejudice. *Id.* at 325.

938. *United States v. Lovasco*, 431 U.S. 783, 790 (1977). The *Lovasco* defendants argued that the indictment should be dismissed because an eighteen month pre-indictment delay had caused them to lose the testimony of a material witness. The Government argued that the delay had been necessary to discover other participants in the crime. The Court acknowledged that the defendants had established the existence of actual prejudice, but nevertheless refused to dismiss the indictment because it found the Government's reasons for the delay to be valid. The Court specifically stated that prosecutors are under no duty to file charges as soon as probable cause exists if they are not also satisfied that their investigations are complete, or if they are unable to establish a suspect's guilt beyond a reasonable doubt. *Id.* at 790-96.

939. *United States v. Mays*, 549 F.2d 670, 677 (9th Cir. 1977).

940. *Id.* at 677-78. The *Mays* defendants established that three material witnesses had

ever, that without proof of actual prejudice, it is unnecessary to consider the length of or reasons for the delay.<sup>941</sup> The Ninth Circuit has recently considered cases in which pre-indictment delay has allegedly prejudiced the defense.

In *United States v. Cederquist*,<sup>942</sup> the Government appealed the dismissal of an indictment charging the defendants with using the mails to defraud certain banks through a check kiting scheme. The Government did not obtain the indictment until almost five years after it had been alerted to the possible existence of the defendants' scheme.<sup>943</sup> The district court agreed with defendants that the pre-indictment delay had prejudiced their defense of lack of fraudulent intent.<sup>944</sup> Any evidence showing that the defendants had reasonably expected that deposits would cover the banks' checks when they were presented for payment would have negated the element of fraudulent intent,<sup>945</sup> and the defendants argued that this evidence had once existed in documents pertaining to loans being processed during the operation of the check kiting scheme.<sup>946</sup> These documents, however, were allegedly lost during the four year delay. The defendants therefore contended that they were no longer able to prove their defense.<sup>947</sup>

The Ninth Circuit stated that the dispositive issue was not whether the pre-indictment delay had resulted in the loss of certain documents, "but whether the delay had actually impaired [the defendants'] ability

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died and the memories of other witnesses had dimmed during a four and one-half year pre-indictment delay. The Ninth Circuit, however, reversed the district court's dismissal of the indictment because the defendants had neither proved exactly what evidence their witnesses would have provided, nor how the loss of this evidence would have prejudiced them. *Id.* at 679-80.

941. *United States v. West*, 607 F.2d 300, 304 (9th Cir. 1979). The *West* defendant asserted that pre-indictment delay had caused him to lose certain witnesses necessary to his defense. The court held that this assertion was insufficient to establish actual prejudice because the defendant could only speculate about the testimony of these witnesses. Furthermore, the court found that the testimony would have been irrelevant. *Id.*

942. 641 F.2d 1347 (9th Cir. 1981).

943. *Id.* at 1350. The check kiting scheme allegedly began in October 1973 and continued until April 16, 1974. On March 21, 1974, the First National Bank of Arizona informed the United States attorney's office of a possible check kiting scheme operated by the defendants. Grand jury subpoenas for records of the defendants' financial activities were issued to several lending institutions, and to the defendants in September 1975, November 1977, and December 1977. On December 27 and 28, 1978, testimony was presented to the grand jury, and an indictment was returned on December 28, 1978. *Id.*

944. *Id.* at 1351.

945. See *Williams v. United States*, 278 F.2d 535, 537 (9th Cir. 1960).

946. 641 F.2d at 1351.

947. *Id.*

meaningfully to defend [themselves]."<sup>948</sup> It observed that substitute evidence existed, for example, memoranda written by bank employees or the possible testimony of bank representatives who had been at meetings where the defendants' overdrafts and pending loans had been discussed.<sup>949</sup> The court concluded that although the missing documents might have been the best proof of the asserted defense, their loss was insufficient to establish the actual prejudice necessary to invalidate the indictment.<sup>950</sup>

In *United States v. Mills*,<sup>951</sup> the Government appealed the dismissal of an indictment charging the defendants with killing a fellow inmate at a federal corrections institution. The Government did not obtain the indictment until seven months after the murder.<sup>952</sup> The defendants claimed that because of this delay, they had lost various witnesses, and certain physical evidence had deteriorated.<sup>953</sup> The district court agreed that the defendants had suffered irreparable prejudice.<sup>954</sup>

The Ninth Circuit first noted that in order for the defendants to prove that the loss of witnesses had prejudiced their defense, they must identify the witnesses, relate the efforts made to locate them, and explain the substance of their testimony.<sup>955</sup> It further stated that this proof must be definite, not speculative.<sup>956</sup> The court concluded that the defendants' assertions concerning the loss of witnesses were speculative and, therefore, the loss did not constitute actual prejudice.<sup>957</sup>

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948. *Id.* (quoting *United States v. Pallan*, 571 F.2d 497, 501 (9th Cir.), *cert. denied*, 436 U.S. 911 (1978)).

949. 641 F.2d at 1351-52.

950. *Id.* at 1352-54.

951. 641 F.2d 785 (9th Cir.), *cert. denied*, 454 U.S. 902 (1981).

952. *Id.* at 787. The murder occurred on August 22, 1979, but the defendants were not indicted until March 27, 1980.

953. *Id.* The defendants specifically asserted that they had been unable to locate witnesses who had been known only by prison nicknames, and had since been transferred to other facilities or released, and that the memories of witnesses who allegedly could have supported their alibis or who "might" have had some useful information had dimmed. They further contended that documents which might have been useful had been routinely discarded or lost by the Government, that blood stains on the defendants' clothes could no longer be typed to prove their origin, and that wounds and finger impressions on the defendants' arms were no longer present. *Id.* at 788-89.

954. *Id.* at 787.

955. *Id.* at 788 (citing *United States v. Tousant*, 619 F.2d 810 (9th Cir. 1980)).

956. 641 F.2d at 788 (citing *United States v. Swacker*, 628 F.2d 1250, 1254 (9th Cir. 1980); *United States v. Tousant*, 619 F.2d 810 (9th Cir. 1980)).

957. 641 F.2d at 789 (citing *United States v. Rogers*, 639 F.2d 438 (8th Cir. 1981); *United States v. West*, 607 F.2d 300, 304 (9th Cir. 1979); *United States v. Mays*, 549 F.2d 670, 679-80 (9th Cir. 1977)). The court determined that the defendants' assertions were speculative because: (1) there was no proof that the prison nicknames of the alleged witnesses had been recorded or that the actual identities of the witnesses were ascertainable; (2) there was no



The court next examined the defendants' contentions regarding the loss of physical evidence and observed that this evidence could have been lost even if the Government had indicted the defendants one month after the murder.<sup>958</sup> It concluded, therefore, that the loss was not related to the pre-indictment delay and did not cause actual prejudice;<sup>959</sup> thus, the court reinstated the indictment.<sup>960</sup>

The Ninth Circuit's decisions concerning time limitations on obtaining indictments demonstrate that it is willing to dismiss those not obtained within the period of the applicable statute of limitations (*Akmakjian*). The Ninth Circuit is justifiably reluctant, however, to dismiss indictments that have been filed within the statutory period but are alleged to have been delayed to the defendant's detriment. The court stringently requires that defendants establish actual prejudice, with proof of the loss of *specific* evidence (*Mills*) which has deprived them of *any* ability to present a defense (*Cederquist*) and is a direct result of the delay (*Mills*), thus assuring that indictments will not be dismissed solely on the basis of allegations that are more likely to be self-serving than legitimate.

#### 4. Competence and legality of evidence

The Supreme Court has held that an indictment is sufficient to initiate trial if it is valid on its face.<sup>961</sup> An indictment cannot, therefore, be attacked on the ground that evidence before the grand jury was in-

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evidence regarding the content of the witnesses' testimony except the defendants' self-serving affidavits; and (3) there was no actual proof of the prospective witnesses' memory impairment. 641 F.2d at 789.

958. 641 F.2d at 789. The court noted that there was no evidence concerning the deterioration rate of blood stains, when the defendants' wounds had healed, or when the documents had been destroyed or lost. *Id.*

959. *Id.* (citing *United States v. Walker*, 601 F.2d 1051, 1057 (9th Cir. 1979)). The *Walker* defendants had been indicted for the arson of a prison dormitory. They argued that because of pre-indictment delay, the dormitory had been rebuilt and evidence concerning the origin of the fire had been lost. The court noted that, due to an inmate housing crisis, construction of the new dormitory had begun within a few days after the fire. It concluded, therefore, that there was no way the indictment could have been obtained before the dormitory was rebuilt. Thus, the loss of evidence was not related to the pre-indictment delay and did not constitute actual prejudice. *Id.* at 1057.

960. 641 F.2d at 789. The court stated that because the defendants had failed to establish actual prejudice, it was unnecessary to consider the length of, or the reason for, the delay. Nevertheless, it noted that an eight month delay is not inordinate compared to the thirteen month delay in *Walker*, *supra* note 959, and the four and one-half year delay in *Mays*, *supra* note 939, and considering that here there was no evidence of intentional or reckless governmental delay. 641 F.2d at 789 n.2.

961. *Costello v. United States*, 350 U.S. 359, 363 (1956).

competent or inadequate<sup>962</sup> or obtained in violation of the defendant's constitutional rights.<sup>963</sup> The Ninth Circuit has recently considered cases in which indictments have been attacked on all of these grounds, and it has relied heavily on Supreme Court opinions to support its decisions.

In *United States v. Seifert*,<sup>964</sup> the defendants challenged their indictment, alleging that it was based exclusively on the misleading and inaccurate hearsay testimony of an FBI agent.<sup>965</sup> The defendants also alleged that the Government had failed to present certain favorable evidence to the grand jury that would have revealed that the prosecution's witness had made prior inconsistent statements and had been previously convicted of a drug offense.<sup>966</sup>

The Ninth Circuit upheld the indictment, stating that the Government was neither required to present exculpatory evidence,<sup>967</sup> nor was

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962. *Id.* The *Costello* Court upheld an indictment charging the defendant with income tax evasion that was based exclusively on hearsay evidence from three investigating officers. The Court stated:

If indictments were to be held open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury, the resulting delay would be great indeed. The result of such a rule would be that before trial on the merits a defendant could always insist on a kind of preliminary trial to determine the competency and adequacy of the evidence before the grand jury. This is not required by the Fifth Amendment. An indictment returned by a legally constituted and unbiased grand jury . . . is enough to call for trial of the charges on the merits.

*Id.* at 363-64.

963. *United States v. Calandra*, 414 U.S. 338, 349 (1974); *Lawn v. United States*, 355 U.S. 339, 350 (1958). In *Calandra*, the Court considered whether a witness before a grand jury could refuse to answer questions on the ground that they were derived from evidence obtained from an unlawful search and seizure. The Court weighed the potential damage to the role and function of the grand jury against the potential benefits of applying the exclusionary rule to grand jury proceedings. It concluded that the application of the rule to grand jury proceedings would achieve little towards furthering the rule's goal of deterring police misconduct. Thus, any "benefit" would be far outweighed by the delay and disruption caused by suppression hearings and litigation of issues previously reserved for trial on the merits. The Court, therefore, decided against the witness. 414 U.S. at 349-51, 355.

In *Lawn*, the Court considered whether the defendants were entitled to a hearing to determine whether the grand jury had based its indictment on evidence obtained in violation of the defendants' fifth amendment rights. The Court held that they were not entitled to a hearing, primarily because the facts did not indicate that the grand jury had used such evidence. However, it indicated that even if the grand jury *had* used such evidence, the indictment still would have been upheld. 355 U.S. at 349-50.

964. 648 F.2d 557 (9th Cir. 1980).

965. *Id.* at 564.

966. *Id.*

967. *Id.* (citing *United States v. Kennedy*, 564 F.2d 1329, 1335-38 (9th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978)). The *Kennedy* defendant had been convicted of a scheme to illegally obtain money from a federally insured bank to purchase an insurance business. The court upheld the indictment even though the prosecutor had not presented to the grand jury evidence, e.g., affidavits from the other participants and the defendant's polygraph,

it required to present evidence relating to the credibility of the prosecution's witness.<sup>968</sup> It further stated that an indictment may be based solely on hearsay evidence,<sup>969</sup> even when percipient witnesses could have been produced,<sup>970</sup> and that the inaccuracies in the agent's testimony were not sufficiently flagrant to dismiss an otherwise valid indictment.<sup>971</sup>

In *United States v. Trass*,<sup>972</sup> the Government appealed from a second dismissal of an indictment based on an FBI agent's hearsay testimony. The Government had informed the grand jury that the agent's testimony was hearsay, and that the witnesses would be produced if the grand jury wished to hear them.<sup>973</sup> The Government had also disclosed the witnesses' prior arrest records and that the witnesses had been told that they might not be prosecuted for their dealings with the defendants if they testified.<sup>974</sup> The Assistant United States Attorney stated that although he had not personally made promises to the witnesses, had he been asked, he probably would have offered immunity from prosecution.<sup>975</sup>

Nonetheless, the district court dismissed the indictment because the Government had not made the witnesses immediately available, and the proceedings would have been delayed if the grand jury had decided to call them.<sup>976</sup> The court also criticized the Government for not having made an even more complete statement of the prosecutor's

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which the defendant regarded as exculpatory. The court stated that "only in a flagrant case, and perhaps only where knowing perjury, relating to a material matter, has been presented to the grand jury should the trial judge dismiss an otherwise valid indictment. . . ." *Id.* at 1338.

968. 648 F.2d at 564 (citing *United States v. Lasky*, 600 F.2d 765 (9th Cir. 1979); *United States v. Y. Hata and Co.*, 535 F.2d 508 (9th Cir. 1976)). The *Lasky* court upheld an indictment despite the prosecutor's failure to inform the grand jury that a complaint against the defendant containing the same allegations had been dismissed for lack of evidence. 600 F.2d at 768. The court in *Y. Hata* upheld an indictment although the prosecutor had not provided the grand jury with all of the evidence tending to exculpate the defendant. 535 F.2d at 512.

969. 648 F.2d at 564 (citing *Costello v. United States*, 350 U.S. 359 (1956)).

970. 648 F.2d at 564 (citing *United States v. Short*, 493 F.2d 1170 (9th Cir. 1974)).

971. 648 F.2d at 564 (citing *United States v. Kennedy*, 564 F.2d 1329, 1338 (9th Cir. 1977), *cert. denied*, 435 U.S. 934 (1978)).

972. 644 F.2d 791 (9th Cir. 1981).

973. *Id.* at 794.

974. *Id.*

975. *Id.* The Government had taken care to disclose this information to the grand jury because the district court had already dismissed an identical indictment for the Government's failure to make these disclosures. *Id.* at 792-93.

976. *Id.* at 794.

agreement with the witnesses.<sup>977</sup>

The Ninth Circuit held that the manner in which the evidence had been presented to the grand jury did not require dismissal of the indictment.<sup>978</sup> It stated that the Government's failure to have witnesses immediately available did not justify dismissal because even *exclusive* reliance on hearsay evidence does not invalidate indictments.<sup>979</sup> The court further stated that the incomplete explanation of the prosecutor's agreement with the witnesses also did not warrant dismissal because the Government is neither required to present all available exculpatory evidence, nor is it required to present all evidence respecting the credibility of potential witnesses.<sup>980</sup> The Ninth Circuit reinstated the indictment,<sup>981</sup> concluding that under controlling precedent it should not have been dismissed for inadequate or incompetent evidence.<sup>982</sup>

In *United States v. Kenny*,<sup>983</sup> one defendant challenged his indictment, arguing that the Government had deliberately destroyed certain records that might have exculpated him.<sup>984</sup> Another defendant argued that a valid indictment could not have been returned because the prose-

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977. *Id.*

978. *Id.* at 796.

979. *Id.*

980. *Id.* at 796-97. In *Loraine v. United States*, 396 F.2d 335 (9th Cir. 1968), the court upheld an indictment even though the Government had not informed the grand jury that one of its witnesses had a criminal record and was under indictment in several other cases, that a second witness had been charged with embezzlement, and that a third witness had been enjoined from dealing in securities. *Id.* at 339.

981. 644 F.2d at 795 (citing *Costello v. United States*, 350 U.S. 359, 363-64 (1956); *United States v. Chanen*, 549 F.2d 1306, 1313 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977)). The *Chanen* court held that hearsay testimony was sufficient to support an indictment. It explained that "given the constitutionally-based independence of the . . . court, prosecutor and grand jury," a court should not encroach upon the manner in which the prosecutor presents a case to the grand jury "unless there is a clear basis in fact and law for doing so." Any other rule "could readily prove subversive to the doctrine of separation of powers." 549 F.2d at 1313.

982. 644 F.2d at 795. In *United States v. Vallez*, 653 F.2d 403 (9th Cir. 1981), the defendant challenged his murder indictment, arguing that the Government had implicitly assured the credibility of one of its witnesses by having him testify in two cases before the same grand jury. The Ninth Circuit found the indictment valid, thereby reaffirming the principle that indictments cannot be challenged for incompetent or inadequate evidence. *Id.* at 406 (citing *United States v. Samango*, 607 F.2d 871, 880 n.6 (9th Cir. 1979)).

983. 645 F.2d 1323 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981).

984. *Id.* at 1347. This defendant had been indicted for engaging in fraudulent government contracting activities. The Government alleged that no "deliverable" had ever been produced under certain of the fraudulent contracts which the defendant had supervised during his employment with the Navy. The defendant, however, argued that when he retired from the Navy, he had left certain records and deliverables in a secure area, and that these records and deliverables had been intentionally destroyed by Government agents at a time when the defendant was a known target of the investigation. *Id.*

cutor had failed to instruct the grand jury on the applicable law, and some of the evidence presented to the grand jury had been obtained in violation of the fourth, fifth, and sixth amendments.<sup>985</sup>

The Ninth Circuit upheld both indictments.<sup>986</sup> The court determined that the first defendant's contention regarding the destruction of exculpatory records was factually incorrect. Thus, the court did not address whether dismissal of the indictment would have been required if the Government had deliberately destroyed such evidence.<sup>987</sup>

The other defendant's contention regarding the insufficient jury instruction was rejected because an indictment need only be prepared by a prosecutor whose presumed familiarity with the "applicable law" is sufficient to acquaint the grand jury with a case's legal aspects.<sup>988</sup> The court stated that it could find no constitutional requirement that grand jurors receive instructions on the applicable law.<sup>989</sup> It expressed concern that to require such instructions would result in protracted review of their adequacy and correctness, both by the trial court during motions for dismissal, and later by the appellate court.<sup>990</sup> Finally, the court concluded that even if the defendant could prove a violation of his constitutional rights, this would not require the dismissal of an otherwise valid indictment.<sup>991</sup>

The Ninth Circuit's refusal to dismiss indictments challenged for incompetent or illegal evidence demonstrates its adherence to the Supreme Court's holding that an indictment need only be valid on its face.<sup>992</sup> Ninth Circuit decisions recognize that rigid rules upon the conduct of the grand jury would greatly limit its ability to ferret out and

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985. *Id.* at 1338-39, 1347. Before this defendant had been indicted, the prosecutor arranged with the FBI to record a telephone conversation between an informant and the defendant. The defendant answered the informant's call, then returned the call after entering a telephone booth for "more privacy." From the booth he made a number of damaging admissions which were recorded by the informant. This recording was subsequently played before the grand jury. *Id.* at 1337-38.

986. *Id.* at 1347.

987. *Id.* The court noted that the record showed that: (1) any destruction of the defendant's records had been part of the normal housekeeping functions of the Navy; (2) the destruction had been unrelated to and had occurred long before the defendant became a target of the criminal investigation; and (3) because there was no record of what had been destroyed, there was no assurance that any exculpatory materials had been destroyed. *Id.*

988. *Id.* (citing *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977)).

989. 645 F.2d at 1347 (citing *Costello v. United States*, 350 U.S. 359 (1956); *United States v. Kennedy*, 564 F.2d 1329 (9th Cir. 1977), *cert. denied*, 435 U.S. 944 (1978)).

990. 645 F.2d at 1347.

991. *Id.* at 1338 (citing *United States v. Calandra*, 414 U.S. 338, 343 (1974); *Costello v. United States*, 350 U.S. 359, 363 (1956)).

992. *Costello v. United States*, 350 U.S. 359, 364 (1956).

charge wrongdoers, and that permitting challenges to an indictment for imperfections in the presentation of evidence would greatly delay and frustrate the prosecutorial process.<sup>993</sup> These considerations, when balanced against the accused's opportunity to test the Government's evidence during trial, have caused most courts to refuse to scrutinize grand jury proceedings for the use of incomplete or illegal evidence.<sup>994</sup>

The refusal of the courts to establish a rule which would delay the indictment process might be justifiable only when incompetent or inadequate evidence is at issue. However, when evidence has been illegally obtained, the efficiency of grand jury proceedings must be balanced not only against the accused's opportunity to exonerate himself later during trial, but also against the need to protect an individual's constitutional rights.

The Supreme Court has reasoned that the exclusionary rule should not be applied to grand jury proceedings because this extension would not significantly deter police misconduct.<sup>995</sup> In fact, the Court has stated:

Such an extension would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation. The incentive to disregard the requirement of the Fourth Amendment solely to obtain an indictment from a grand jury is substantially negated by the

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993. *United States v. Trass*, 644 F.2d 791, 795 (9th Cir. 1981).

994. *United States v. Hickey*, 596 F.2d 1082, 1089 (1st Cir.), *cert. denied*, 444 U.S. 853 (1979); *United States v. Siegel*, 587 F.2d 721, 728 (5th Cir. 1979); *United States v. Barone*, 584 F.2d 118, 122-25 (6th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *United States v. Helstoski*, 576 F.2d 511, 518-19 (3d Cir. 1978), *aff'd*, 442 U.S. 477 (1979); *United States v. Wallace*, 528 F.2d 863, 865 (4th Cir. 1976); *United States v. Annerino*, 495 F.2d 1159, 1161-62 (7th Cir. 1974); *United States v. Akin*, 464 F.2d 7, 8 (8th Cir.), *cert. denied*, 409 U.S. 981 (1972). The Second Circuit, however, has indicated that it would consider dismissing an indictment based on hearsay if: (1) non-hearsay evidence was readily available; (2) the grand jury was misled into believing that it was hearing direct, rather than hearsay, testimony; or (3) it is doubtful that the grand jury would have indicted had it heard eyewitness testimony. *See, e.g., United States v. Estepa*, 471 F.2d 1132, 1134-37 (2d Cir. 1972); *United States v. Leibowitz*, 420 F.2d 39, 42 (2d Cir. 1969); *United States v. Umans*, 368 F.2d 725, 730-31 (2d Cir. 1966).

Furthermore, the California Supreme Court has held that a prosecutor must inform a grand jury of any evidence that might exculpate the defendant. *Johnson v. Superior Court*, 15 Cal. 3d 248, 539 P.2d 792, 124 Cal. Rptr. 32 (1975) (peremptory writ of prohibition issued because prosecutor failed to inform grand jury that defendant's testimony at preliminary hearing resulted in dismissal of complaint). This decision more closely resembles the standards imposed by the American Bar Association than do federal court decisions. *See STANDARDS FOR CRIMINAL JUSTICE*, Standard 3-3.6(b) (1980) (requiring disclosure of exculpatory evidence to grand jury).

995. *United States v. Calandra*, 414 U.S. 338, 351 (1974).

inadmissibility of the illegally seized evidence in a subsequent criminal prosecution . . . . For the most part, a prosecutor would be unlikely to request an indictment where a conviction could not be obtained. We therefore decline to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the role of the grand jury.<sup>996</sup>

The Supreme Court's statement reveals a certain inconsistency in that if a prosecutor is unlikely to request an indictment when a conviction could not be obtained, then the number of cases where the application of the exclusionary rule would even have to be considered is relatively small. Extending the rule to grand jury proceedings would *not*, therefore, substantially impede the functioning of most grand juries, but would preserve the integrity of the courts by requiring them to reject indictments supported by tainted evidence.<sup>997</sup> Thus, a strong argument exists for establishing a rule requiring dismissal of indictments that are based on illegally obtained evidence.

## 5. Amendments

There are two types of indictment amendments. The first is an "actual" amendment, and occurs when the prosecutor or court alters the indictment's charging terms, either literally or through jury instructions.<sup>998</sup> The second type is a "variance" or "constructive" amendment, and occurs when the indictment's charging terms remain unaltered but the evidence at trial proves facts different from those alleged in the indictment.<sup>999</sup> Both types are considered harmless error if they (1) arise from simple clerical mistakes or textual redundancy, and (2) do not impair the defendant's notice of the charges or right against double jeopardy.<sup>1000</sup> However, if either type substantially alters or broadens the essential elements of the offense, it is considered *per se*

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996. *Id.* at 351-52.

997. For a discussion of judicial integrity in relation to the exclusionary rule, see *Elkins v. United States*, 364 U.S. 206, 222-23 (1959).

998. *See, e.g., Gaither v. United States*, 413 F.2d 1061, 1071 (D.C. Cir. 1969).

999. *See, e.g., United States v. Lyman*, 592 F.2d 496, 501 (9th Cir. 1978), *cert. denied*, 442 U.S. 931 (1979); *Gaither v. United States*, 413 F.2d 1061, 1071 (D.C. Cir. 1969).

1000. *See, e.g., United States v. Lyman*, 592 F.2d 496, 500-01 (9th Cir. 1978), *cert. denied*, 442 U.S. 931 (1979); *United States v. Abascal*, 564 F.2d 821, 832 (9th Cir. 1977), *cert. denied*, 435 U.S. 953 (1978); *United States v. Somers*, 496 F.2d 723, 744 (3d Cir.), *cert. denied*, 419 U.S. 832 (1974); *Stewart v. United States*, 395 F.2d 484, 488 (8th Cir. 1968).

reversible error.<sup>1001</sup> The Ninth Circuit has recently considered cases in which arguments to reverse convictions have been based upon indictment amendments.

In *United States v. Stewart Clinical Laboratory, Inc.*,<sup>1002</sup> the indictment charged the defendants with offering remuneration as an inducement for the referral of patients to their laboratory. Their convictions, however, were based upon evidence of referrals for laboratory work.<sup>1003</sup> Thus, the indictment had been constructively amended from charging an offense under 42 U.S.C. section 1396h(b)(2)(A)<sup>1004</sup> to charging an offense under 42 U.S.C. section 1396h(b)(2)(B).<sup>1005</sup>

The Ninth Circuit held that such an amendment, or variance, was fatal to the defendants' convictions.<sup>1006</sup> The court observed that the variance did not arise from a clerical error or surplusage in the indictment's text;<sup>1007</sup> nor could the reference to "patients" in the indictment be interpreted to include "parts and substances" removed from patients.<sup>1008</sup> It further determined that Congress, by dividing section 1396h(b)(2) into two subsections, had obviously intended to proscribe

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1001. *See, e.g.*, *Stirone v. United States*, 361 U.S. 212, 215-19 (1960); *United States v. Beeler*, 587 F.2d 340, 342 (6th Cir. 1978); *Edgerton v. United States*, 143 F.2d 697, 698 (9th Cir. 1944).

1002. 652 F.2d 804 (9th Cir. 1981).

1003. *Id.* at 805.

1004. 42 U.S.C. § 1396h(b)(2)(A) (Supp. III 1979) proscribes offering or paying any remuneration to any person to induce that person to "refer an individual to a person" for furnishing services.

1005. 42 U.S.C. § 1396h(b)(2)(B) (Supp. III 1979) proscribes offering or paying any remuneration to any person to induce that person to "purchase, lease or order . . . any good, facility, service, or item."

1006. 652 F.2d at 807.

1007. *Id.* (citing *United States v. Lyman*, 592 F.2d 496, 500-01 (9th Cir. 1978), *cert. denied*, 442 U.S. 931 (1979); *United States v. Abascal*, 564 F.2d 821, 832 (9th Cir. 1977), *cert. denied*, 435 U.S. 953 (1978)). In *Lyman*, the indictment charged the defendants with conspiracy. They moved to reverse their convictions because twenty out of the twenty-four overt acts alleged in the original indictment had been deleted before the trial; and certain of the facts alleged in the indictment had not been proved at trial. The court held that these amendments were not fatal to the convictions because they neither altered nor broadened the offense charged, and because the facts that were not proven at trial were not essential elements of the charged offense. 592 F.2d at 500-01.

In *Abascal*, the indictment charged the defendants with conspiracy to import, distribute, and possess with an intent to distribute LSD. At trial, the defendants moved for acquittal because the Government failed to present any evidence of LSD importation. The trial court, however, denied the motion and simply deleted the word "import" from the indictment. The court of appeals upheld the indictment, stating that because the Government was not required to prove all three elements of the conspiracy, the term "import" was surplusage. 564 F.2d at 832.

1008. 652 F.2d at 806.



two entirely different types of behavior.<sup>1009</sup> The court concluded that the variance between the facts alleged in the indictment and the evidence produced at trial resulted in the defendants' conviction for a crime completely different from the one charged in the indictment. This constituted reversible error *per se*.<sup>1010</sup>

In *United States v. Fekri*,<sup>1011</sup> the defendants were convicted of offering physicians discounted laboratory services in exchange for referrals of Medi-Cal laboratory work. As in *Stewart*, the indictment charged them with violating 42 U.S.C. section 1396h(b)(2)(A) rather than 42 U.S.C. section 1396h(b)(2)(B), but, unlike *Stewart*, the indictment correctly charged them with attempting to induce referrals of "work" rather than "patients."<sup>1012</sup> The Ninth Circuit held that because the error was merely one of citation<sup>1013</sup> and the defendants were not prejudiced, the variance did not require a reversal of the convictions.<sup>1014</sup>

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1009. *Id.* at 806-07.

1010. *Id.* at 807 (citing *Stirone v. United States*, 361 U.S. 212, 215-19 (1960); *United States v. Beeler*, 587 F.2d 340, 343 (6th Cir. 1978)). In *Stirone*, the indictment alleged that the defendant had interfered with interstate commerce by extortion. The only interstate commerce mentioned in the indictment was the importation of sand into Pennsylvania to build a steel plant. The defendant moved to reverse his conviction because the evidence at trial showed an additional interference with the exportation of steel to be manufactured in the new plant. The Court held that such a variance was fatal to the defendant's conviction, because the conviction was based on proof of his interference with the exportation of steel, thereby depriving the defendant of his right to be tried only on the charges presented in the indictment. 361 U.S. at 217.

The *Beeler* indictment charged the defendant with extortion, alleging that he had received certain payments from January 1973 to November 1975. The defendant moved to reverse his conviction because the evidence at trial showed that he had accepted an even larger payment in July, 1972. The Sixth Circuit held that this variance was fatal to the conviction because it created a "substantial likelihood" that the defendant was convicted of an offense other than the one charged in the indictment. 587 F.2d at 342.

In addition to its reliance on *Stirone* and *Beeler*, the Ninth Circuit noted the resemblance between *Stewart* and *United States v. Prejean*, 494 F.2d 495 (5th Cir. 1974). 652 F.2d at 807 n.2. In *Prejean*, the court held an indictment invalid because the Government had proven a violation of Texas Penal Code article 1391, instead of article 1389 as alleged in the indictment. 494 F.2d at 498.

1011. 650 F.2d 1044 (9th Cir. 1981).

1012. *Id.* at 1046.

1013. *Id.* (citing *Williams v. United States*, 168 U.S. 382, 389 (1897); FED. R. CRIM. P. 7(c)(3)). Rule 7(c)(3) provides that "[e]rror in the citation or its omission shall not be ground for dismissal of the indictment . . . if the error or omission did not mislead the defendant to his prejudice."

1014. 650 F.2d at 1046. The defendants in *Fekri* had not objected on appeal to the variance between the indictment and the proof offered at trial. The Ninth Circuit apparently raised the issue because of its similarity to the one in *Stewart*, and the consequent need to distinguish it.

The Ninth Circuit's decisions regarding indictment amendments reflect its concern with furthering the twin purposes of an indictment: notifying the defendant of the charges and protecting the defendant against double jeopardy. The courts are careful to protect a defendant's rights by assuming that any alteration of the essential elements of an offense is prejudicial *per se*. However, the courts recognize that when the text of an indictment is substantially correct, a simple error in citation without proof of prejudice does not violate a defendant's rights. The Ninth Circuit's position protects a defendant's rights without permitting the reversal of convictions for insignificant technical errors.

#### 6. Dismissal for selective prosecution

Dismissal of an indictment may be sought on the ground of selective prosecution where charges were filed in response to a defendant's exercise of his or her constitutional rights.<sup>1015</sup> The subject of selective prosecution was recently addressed by the Ninth Circuit in two decisions.

In *United States v. Sears, Roebuck and Co., Inc.*,<sup>1016</sup> the Ninth Circuit considered the method of proof applicable to selective prosecution claims. Defendant Sears was indicted for making false statements and furnishing false invoices to the United States Customs Service in violation of 18 U.S.C. section 542.<sup>1017</sup> Sears moved to dismiss the indictment, arguing that because it interfered with the right to engage freely in business and foreign commerce, the indictment constituted selective prosecution.<sup>1018</sup> The district court denied the motion, and Sears filed an interlocutory appeal with the Ninth Circuit.<sup>1019</sup>

Noting that a claim of selective or discriminatory prosecution can be the proper subject of an interlocutory appeal,<sup>1020</sup> the Ninth Circuit

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1015. *United States v. Wilson*, 639 F.2d 500, 502 (9th Cir. 1981).

1016. 647 F.2d 902 (9th Cir. 1981).

1017. *Id.* at 902.

1018. *Id.* at 904-05.

1019. *Id.* at 903. An interlocutory appeal is an appeal which is not completely determinative of a controversy, but is necessary for a suitable adjudication on the merits of that controversy. The *Sears* court stated:

In *Abney* [*Abney v. United States*, 431 U.S. 651 (1977)], the Supreme Court established a three-part test to determine whether an interlocutory appeal should be allowed. An order before final judgment may be appealed if: (1) it completely disposes of the issue in question; (2) it is totally unrelated to the merits of the case; and (3) the right asserted would be irreparably lost if the appeal were delayed until after final judgment.

*Id.* (quoting *United States v. Mehrmanesh*, 652 F.2d 766, 768 (9th Cir. 1981)).

1020. 647 F.2d at 904. In *United States v. Abney*, 431 U.S. 651 (1977), the United States Supreme Court held that a double jeopardy ruling is subject to interlocutory appeal under

set forth the test to be applied to such claims:

The law in this Circuit places the burden squarely upon the defendants to prove in a selective prosecution: 1. That others are generally not prosecuted for the same conduct; 2. [That] [the] decision to prosecute this defendant was based on impermissible grounds such as race, religion or the exercise of constitutional rights.<sup>1021</sup>

The court concluded that Sears had failed to prove or even allege that the Government's decision to prosecute was based on impermissible grounds.<sup>1022</sup> Sears could not claim that it had been prosecuted because of its race or religion,<sup>1023</sup> and Sears did not assert that the decision to prosecute was in response to its exercise of a constitutional right.<sup>1024</sup> In regard to Sears' assertions that the prosecution interfered with its right to engage freely in business and foreign commerce, the court held that these were not adequate to support a claim of selective prosecution.<sup>1025</sup>

In *United States v. Ness*,<sup>1026</sup> the Ninth Circuit rejected the defend-

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the collateral order exception to the final judgment rule. *Id.* at 662. In *United States v. Griffin*, 617 F.2d 1342 (9th Cir. 1980), the Ninth Circuit extended the *Abney* exception to orders denying motions alleging vindictive prosecution. The court in *United States v. Wilson*, 639 F.2d 500 (9th Cir. 1981), extended the exception again to cases of selective prosecution. The *Wilson* court noted that there is little substantive difference between selective and vindictive prosecution, and that the interests involved in both types are the same: "the defendant seeks protection from criminal prosecution initiated punitively, in response to the exercise of his constitutional rights." 639 F.2d at 502.

1021. 647 F.2d at 904 (citing *United States v. Wilson*, 639 F.2d 500, 503 (9th Cir. 1981)).

1022. 647 F.2d at 904.

1023. *Id.* The court cited the United States Supreme Court's decision in *Oyler v. Boles*, 368 U.S. 448 (1962). The *Oyler* petitioners were serving life sentences under West Virginia's habitual criminal statute which requires a mandatory life sentence upon the third conviction "of a crime punishable by confinement in a penitentiary." *Id.* at 449. The Supreme Court affirmed the judgment of the Supreme Court of Appeals of West Virginia, which denied the petitioners' writ of habeas corpus. The petitioners had alleged in the writ that the Act had been applied to only a minority of those subject to its provisions, thereby denying them equal protection. The Court stated: "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation," and continued: "it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification. Therefore, grounds supporting a finding of a denial of equal protection were not alleged." *Id.* at 456.

1024. 647 F.2d at 904. See *supra* text accompanying note 1015.

1025. *Id.* at 904-05. In *United States v. Choate*, 619 F.2d 21 (9th Cir. 1980), the defendant claimed he was prosecuted because he was suspected of another offense which Government attorneys felt they could not prove at the time. The *Choate* court held that because the defendant's appeal did not present a claim that his prosecution was based on his exercise of a first amendment right or his race or religion, there was no discriminatory prosecution and no denial of equal protection of the law. *Id.* at 23-24.

1026. 652 F.2d 890 (9th Cir. 1981).

ant's claim of selective prosecution and affirmed his conviction for willfully filing a false W-4 form in violation of 26 U.S.C. section 7205.<sup>1027</sup> At a pretrial hearing defendant Ness attempted to make a prima facie showing that he was a victim of selective prosecution.<sup>1028</sup> He argued on appeal that he was improperly denied the discovery and hearing necessary to prove his selective prosecution claim and that therefore his case should have been remanded for an evidentiary hearing on that issue.<sup>1029</sup>

The Ninth Circuit restated the two-part test that a defendant must meet to succeed on a claim of selective prosecution.<sup>1030</sup> It then held that Ness had failed to make an adequate prima facie showing on either part of the test.<sup>1031</sup> Ness did not establish that similarly situated

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1027. *Id.* at 891-93. Ness filed an exempt W-4 form, falsely claiming that he had no income tax liability during the previous year and expected none for the year in which he filed the form. *Id.* at 891. Ness also renewed his claim for exemption from withholding even after the Internal Revenue Service notified him that he was ineligible, and that he could be criminally prosecuted for falsifying his W-4. *Id.*

1028. *Id.* at 892.

1029. *Id.* See *United States v. Oaks*, 508 F.2d 1403 (9th Cir. 1974), in which defendant Oaks contended that he was selected for prosecution solely because he protested publicly against federal tax policies. *Id.* at 1404. The court stated that the district court should allow a defendant to present evidence that he or she has been singled out for discriminatory prosecution upon a proper offer of proof. It held that Oaks had alleged facts sufficient to require such a hearing and remanded the cause for a hearing on discriminatory prosecution. *Id.* at 1405.

1030. 652 F.2d at 892. "[A] defendant has the burden of establishing that others similarly situated have not been prosecuted and that the allegedly discriminatory prosecution of the defendant was based on an impermissible motive." *Id.* (citing *United States v. Wilson*, 639 F.2d 500, 503-04 (9th Cir. 1981)).

The court noted that if a defendant seeking to prove a claim of selective prosecution fails to carry this burden such a claim might be used by the defendant to obtain information to which he or she would not be entitled under normal discovery provisions. 652 F.2d at 892. See *United States v. Murdock*, 548 F.2d 599, 600 (9th Cir. 1977); *United States v. Berrios*, 501 F.2d 1207, 1211-12 (2d Cir. 1974). See generally *United States v. Steele*, 461 F.2d 1148, 1151-52 (9th Cir. 1972).

The court further noted that the records in this case did not contain any motion for discovery adequate under FED. R. CRIM. P. 16(a)(1)(C). 652 F.2d at 892 n.1. FED. R. CRIM. P. 16(a)(1)(C) provides:

Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

The court stated that discovery could properly have been denied solely on this basis. 652 F.2d at 892 n.1.

1031. 652 F.2d at 892.

violators had not been prosecuted,<sup>1032</sup> nor had he suggested any discrimination in the decision to prosecute him.<sup>1033</sup> The court emphasized that "[t]ax violations are *not* a protected form of political dissent," and that "*proper* prosecutorial considerations, such as deterrence of widespread tax evasion, will inevitably lead to the prosecution of numerous protest violators."<sup>1034</sup>

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1032. *Id.* The court compared *Ness* with *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972). Defendant Steele had engaged in public attacks upon the census and was subsequently convicted for refusing to answer questions on 1970 census forms. *Id.* at 1150. Six others who had also refused to answer questions, but had not publicly attacked the census, were not prosecuted. *Id.* at 1151. According to the court, this created an "inference of discriminatory selection." *Id.* at 1152. The only explanation offered by the Government in justification of the discrepancy was prosecutorial discretion, which, the court held, was inadequate to rebut the inference. *Id.*

The Ninth Circuit observed in *Ness* that the defendant had failed to show that similarly situated, but nonprotesting, tax violators had not been prosecuted. 652 F.2d at 892. Rather, his evidence consisted of proof that other members of his tax protest group *had* also been prosecuted. *Id.*

1033. *Id.* at 892. "To make out a *prima facie* case of selective prosecution a defendant must show evidence of impermissible motive at some crucial stage in the procedures leading to the initiation of prosecution." *Id.* In *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972), the Government had bypassed normal procedures for selecting cases for prosecution. *Id.* at 1151. The resulting prosecution of only those who had *publicly* attacked the census aided the court in concluding that the prosecution had been impermissibly motivated by the defendant's first amendment protest activities. *Id.* at 1152.

The *Ness* court contrasted *Steele* with *United States v. Erne*, 576 F.2d 212 (9th Cir. 1978), where the defendant contended that the district court improperly refused to hold an evidentiary hearing on his claim of discriminatory prosecution. *Id.* at 213. The court held, however, that Erne did not allege sufficient facts to justify an evidentiary hearing. *Id.* Erne's allegations were aimed at particular internal revenue officers, whereas the decision to prosecute was made by the United States Attorney, after consulting with the Intelligence Division and the Regional Counsel. *Id.* The Ninth Circuit stated that even if the revenue officer's motives were improper and discriminatory, the entire prosecution would not be tainted because the prosecutor's decision was independent and based on nondiscriminatory policies. *Id.* at 216-17.

1034. 652 F.2d at 892 (emphasis in original). See *United States v. Catlett*, 584 F.2d 864 (8th Cir. 1978), in which the Eighth Circuit affirmed the district court's denial of discovery and a hearing on the defendant's selective prosecution claim. The defendant claimed that he was prosecuted for having willfully and knowingly failed to file his income tax returns because of the publicity his protests received. *Id.* at 866. The court held that the decision to prosecute rested on the protest publicity and that this was not an impermissible ground for prosecution. *Id.* at 867. The court stated that the decision to prosecute "serve[d] a legitimate governmental interest in promoting public compliance with the tax laws" and that "[t]he government is entitled to select those cases for prosecution which it believes will achieve this objective." *Id.* at 868. See also *United States v. Gardiner*, 531 F.2d 953 (9th Cir.), *cert. denied*, 429 U.S. 853 (1976), in which defendant Gardiner argued that his prosecution for failure to file an income tax return and for supplying a false withholding certificate was unconstitutionally selective. *Id.* at 954. He contended that the decision by the Internal Revenue Service to prosecute him was based on public expression of his views. *Id.* However, the Ninth Circuit held that Gardiner failed to make the requisite showing to es-

The court also noted that Ness was not improperly denied the discovery and hearing necessary to prove his claim, because the record revealed that, when granted the opportunity at the hearing on his motion to present evidence, he declined to do so, stating that he needed more time to prepare.<sup>1035</sup> In light of Ness's failure to subpoena witnesses or request discovery, the court found it unnecessary to consider the related question: whether, in the event that he had presented evidence and made out a prima facie case of selective prosecution, it would have been error not to grant a continuance if the Government had resisted Ness's efforts to meet his burden of proof.<sup>1036</sup>

### 7. Dismissal for vindictive prosecution

Dismissal of an indictment may be sought based on vindictive prosecution when the Government escalates the severity of the alleged charges or brings additional charges in response to a defendant's exercise of his or her constitutional or statutory rights.<sup>1037</sup> The Supreme Court has stated that such action on the part of the Government constitutes a "due process violation of the most basic sort," because it penalizes an individual for doing what the law plainly allows.<sup>1038</sup> The Ninth Circuit recently considered a number of decisions in which a claim of vindictive prosecution was raised.

In *United States v. Robison*,<sup>1039</sup> the Ninth Circuit considered whether the filing of an indictment after the defendant had exercised his procedural and appellate rights in unrelated actions constituted vindictive prosecution.<sup>1040</sup> Defendant Robison was charged under 18 U.S.C. section 844(i) with conspiring to destroy a building by means of explosives.<sup>1041</sup> This charge stemmed from the bombing of a tavern in Phoenix, Arizona. Before the indictment was filed, Robison had defended himself against a variety of state and federal charges, including five felony assaults, extortion, and an attempt to blow up a federal building. In addition, Robison sought and received from the Arizona Supreme Court a reversal of his then pending death sentence for the murder of a newspaper reporter in another dynamite blast. Robison

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establish a claim of selective prosecution. *Id.* It stated that Gardiner's violation of the law was so flagrant that the authorities had no choice but to prosecute him. *Id.*

1035. 652 F.2d at 892.

1036. *Id.* at 892-93.

1037. *United States v. Robison*, 644 F.2d 1270, 1272 (9th Cir. 1981).

1038. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

1039. 644 F.2d 1270 (9th Cir. 1981).

1040. *Id.* at 1272.

1041. *Id.* at 1271.

moved for dismissal of the indictments, arguing that the Government sought to punish him for exercising his procedural and appellate rights in the unrelated state and federal proceedings.<sup>1042</sup> The trial court denied this motion, concluding that there was no appearance of vindictiveness, and Robison appealed.<sup>1043</sup>

In its analysis of Robison's vindictive prosecution claim, the Ninth Circuit relied on its recent ruling in *United States v. Griffin*.<sup>1044</sup> The *Griffin* court held that "the presumption of vindictiveness may be inferred even in the absence of evidence that the prosecution . . . acted with a . . . retaliatory motive in seeking the [challenged] indictment."<sup>1045</sup> The presumption arises when the overall circumstances of the prosecutor's decision suggest the "appearance of vindictiveness."<sup>1046</sup> The defendant has the burden of establishing the threshold appearance of vindictiveness.<sup>1047</sup> Once established, the prosecutor must show that independent reasons or intervening circumstances justify his or her decision and therefore dispel the appearance of vindictiveness.<sup>1048</sup>

In applying the *Griffin* analysis to the *Robison* facts, the Ninth Circuit held that Robison had failed to meet his burden. Therefore, the court refused to inquire into the prosecutor's motives.<sup>1049</sup> In distinguishing this case from those in which vindictive prosecution had been found, the court stated that "[i]n almost every case in which courts have condemned prosecutions as vindictive, the defendant, after exercising some procedural right, had been confronted with a more serious or an additional charge arising out of the same nucleus of operative facts as the original charge."<sup>1050</sup> The court then noted that federal authorities

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1042. *Id.*

1043. *Id.* at 1272.

1044. 617 F.2d 1342 (9th Cir.), *cert. denied*, 449 U.S. 863 (1980).

1045. *Id.* at 1346 (citing *Blackledge v. Perry*, 417 U.S. 21, 27-28 (1974)).

1046. 617 F.2d at 1347.

1047. *Id.* See *United States v. Burt*, 619 F.2d 831, 836 (9th Cir. 1980).

1048. 617 F.2d at 1347. See *United States v. Burt*, 619 F.2d 831, 836 (9th Cir. 1980).

1049. 644 F.2d at 1272.

1050. *Id.* See *Blackledge v. Perry*, 417 U.S. 21 (1974). In *Blackledge*, the defendant was convicted of misdemeanor assault with a deadly weapon while serving a term of imprisonment in a North Carolina penitentiary. The defendant subsequently filed a notice of appeal, requesting a trial *de novo*. This was an absolute right accorded him under North Carolina law. Between the time the defendant filed the notice and appeared for the trial *de novo*, the prosecutor obtained a grand jury indictment charging him with the felony of assault with a deadly weapon with intent to kill and inflict serious bodily injury. The basis for this indictment was the same conduct which had resulted in the defendant's previous conviction. The *Blackledge* Court stated: "A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting

had not brought more serious or additional charges against Robison for exercising his procedural rights.<sup>1051</sup> Although the challenged indictment was filed after he sought and received reversal of his death sentence in an unrelated state proceeding, the court concluded that a subsequent federal prosecution for a crime punishable by a maximum ten year prison term would not have deterred the defendant from seeking to avoid the loss of his life.<sup>1052</sup>

The court further observed that "[t]he instant prosecution arose from events separate and distinct from those on which the earlier prosecutions were based."<sup>1053</sup> While acknowledging that this fact is neither dispositive,<sup>1054</sup> nor essential,<sup>1055</sup> the court noted that it is one of the key indicia considered by courts when ruling on charges of vindictive prosecution.<sup>1056</sup>

Robison's claim of vindictive prosecution was also weakened by the fact that although the challenged prosecution "followed immediately upon the heels of his successful state appeal of the unrelated murder conviction,"<sup>1057</sup> this prosecution was brought by the Federal Government, a different sovereign.<sup>1058</sup> The court stated that "[t]hough we do not now hold that a second prosecution can never be vindictive

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a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration." *Id.* at 28. The Supreme Court held that "it was not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo*." *Id.* at 28-29.

The *Blackledge* Court based its analysis on *North Carolina v. Pearce*, 395 U.S. 711 (1969), where the Supreme Court held that the fourteenth amendment prohibits state trial courts from imposing heavier sentences upon reconvicted defendants in order to punish them for succeeding in having their original convictions set aside. "[T]he very threat inherent in the existence of such a punitive policy would . . . serve to 'chill the exercise of basic constitutional rights.'" *Id.* at 724 (citing *United States v. Jackson*, 390 U.S. 570, 582 (1968)).

1051. 644 F.2d at 1273.

1052. *Id.*

1053. *Id.* at 1272.

1054. *Id.* In *United States v. Groves*, 571 F.2d 450 (9th Cir. 1978), the Ninth Circuit stated, "[w]e . . . do not regard the factual similarity/dissimilarity of the two charges as dispositive on the question of vindictiveness; rather, we regard it as only one of the factors bearing on the issue." *Id.* at 454.

1055. 644 F.2d at 1272. In *United States v. DeMarco*, 550 F.2d 1224 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977), the defendant's second indictment was based on substantially the same facts as his first indictment, with the addition of another charge. The Ninth Circuit held that even if the indictments were not based on essentially the same set of facts, the second indictment could still be dismissed if it appeared that the Government was attempting to discourage the defendant from exercising his statutory venue rights. *Id.* at 1226-27.

1056. 644 F.2d at 1272-73 (citing *United States v. Griffin*, 617 F.2d at 1347-48).

1057. 644 F.2d at 1273.

1058. *Id.*



when it follows a successful defense in a foreign jurisdiction, we do hold that the involvement of separate sovereigns tends to negate a vindictive prosecution claim."<sup>1059</sup>

The Ninth Circuit concluded by holding that "[t]he mere fact that this prosecution followed the exercise of certain procedural rights in other, unrelated cases is insufficient to raise the appearance of vindictiveness."<sup>1060</sup> Having determined that Robison had not met his burden of establishing that appearance, the court granted the Government's motion for summary affirmance of the district court's finding.<sup>1061</sup>

The Ninth Circuit again considered the validity of a vindictive prosecution claim in *United States v. Shaw*.<sup>1062</sup> The claim was based on the Government's motion to vacate the defendant's plea-bargained guilty plea in response to his effort to arrest judgment on that plea for lack of subject matter jurisdiction.<sup>1063</sup>

The Government notified defendant Shaw that he was the subject of an investigation into bid-rigging, bribery, kickbacks, and conspiracy relating to Federal Reserve Bank contract awards.<sup>1064</sup> Shaw's attorneys and the Government negotiated a plea agreement whereby Shaw would submit to interviews with investigators and testify before the grand jury as well as at the trials of others who might be indicted.<sup>1065</sup> In return for his cooperation, Shaw would be allowed to plead to one count of the indictment, and, if named in more than one count, would be allowed to choose the count under which he wished to plead.<sup>1066</sup> According to the terms of the agreement, the Government would move at the time of sentencing to dismiss all remaining counts in which Shaw was named, agree to a sentence of probation, and recommend a fine.<sup>1067</sup>

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1059. *Id.* In *United States v. Burt*, 619 F.2d 831 (9th Cir. 1980), the court noted that in previous Ninth Circuit decisions where vindictive prosecution had been found, *see United States v. Groves*, 571 F.2d 450 (9th Cir. 1978); *United States v. DeMarco*, 550 F.2d 1224 (9th Cir.), *cert. denied*, 434 U.S. 827 (1977); *United States v. Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976), the same prosecutor's office had attempted to re-indict or re-try the defendant. 619 F.2d at 836. In *Burt*, the State of California filed the initial indictment and the Federal Government filed the subsequent charges that carried the more substantial penalty. *Id.* at 837. The Ninth Circuit affirmed the district court's denial of the defendant's motion to dismiss the indictment on grounds of vindictive prosecution. *Id.* at 838.

1060. 644 F.2d at 1273.

1061. *Id.*

1062. 655 F.2d 168 (9th Cir. 1981).

1063. *Id.* at 170.

1064. *Id.* at 169.

1065. *Id.*

1066. *Id.* at 170.

1067. *Id.*

When Shaw's attorneys learned that an indictment would be sought against him for bribing a public official in violation of 18 U.S.C. section 201, they informed the Government of a possible subject matter jurisdiction problem. Specifically, they questioned whether employees of a Federal Reserve Bank were public officials within the meaning of section 201.<sup>1068</sup>

Following his grand jury testimony, Shaw was nevertheless indicted for conspiracy, mail fraud, and two section 201 bribery counts.<sup>1069</sup> Exercising his option under the terms of the plea agreement, Shaw chose to plead guilty to one of the bribery counts.<sup>1070</sup> He then filed a timely motion in arrest of judgment under Federal Rule of Criminal Procedure 34,<sup>1071</sup> arguing that the court lacked subject matter jurisdiction to try the offense. The Government moved to vacate Shaw's guilty plea and to set a trial date on the ground that Shaw had entered into the plea agreement with the intention of violating it, thus defrauding the Government and the court.<sup>1072</sup> In opposition to this motion, Shaw argued that he had complied with the plea agreement and that the Government's motion amounted to vindictive prosecution.<sup>1073</sup> The district court granted the Government's motion and entered a plea of not guilty to all four counts of the indictment, stating that the issue surrounding Shaw's arrest of judgment motion was moot in light of its order vacating the guilty plea.<sup>1074</sup>

The Ninth Circuit initially considered whether the district court's order constituted a "final decision" within the meaning of 28 U.S.C. section 1291<sup>1075</sup> and was therefore appealable.<sup>1076</sup> Noting that "[i]t is the law in this Circuit that the complete and final determination of a

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1068. *Id.* While plea negotiations were underway, Shaw's attorneys submitted to the Government an extensive legal memorandum concerning this issue but the Government concluded that subject matter jurisdiction did exist. During the final stages of plea negotiations, Shaw's attorneys again raised the question of subject matter jurisdiction. *Id.* The Government responded that the plea agreement prevented Shaw from litigating the issue, and that even if the plea agreement did not exist, the issue could not be raised after a guilty plea had been entered. *Id.*

1069. *Id.*

1070. *Id.*

1071. FED. R. CRIM. P. 34 states:

The court on motion of a defendant shall arrest judgment if indictment or information does not charge an offense or if the court was without jurisdiction of the offense charged. The motion in arrest of judgment shall be made within 7 days after verdict or finding of guilty, or after plea of guilty or *nolo contendere*, or within such further time as the court may fix during the 7-day period.

1072. 655 F.2d at 170.

1073. *Id.*

1074. *Id.*

1075. 28 U.S.C. § 1291 (1976) provides in pertinent part: "The courts of appeals shall have

vindictive prosecution claim is subject to interlocutory appeal under the 'collateral order' exception to the final judgment requirement,"<sup>1077</sup> the court concluded that it had jurisdiction to consider Shaw's claim of vindictive prosecution.<sup>1078</sup>

The court then held that Shaw had made a *prima facie* showing of vindictiveness.<sup>1079</sup> This ruling was based on the Government's admission that it had moved to vacate Shaw's guilty plea in retaliation for his motion to arrest judgment.<sup>1080</sup> Thus, under the principles set forth in *Blackledge v. Perry*,<sup>1081</sup> the effect of the trial court's vacation of the plea was to "up the ante" against Shaw by forcing him to go to trial on all four counts of the indictment instead of permitting him, as was his bargained for right, to plead guilty to one charge and have the remaining charges dismissed.<sup>1082</sup>

Restating the well-established principle that subject matter jurisdiction cannot be waived and can be raised at any time,<sup>1083</sup> the Ninth Circuit also held that Shaw did not violate the terms of his plea agreement by challenging the court's subject matter jurisdiction.<sup>1084</sup> Nor did Shaw attempt to perpetrate a fraud on the Government by pleading guilty to a charge when he doubted that the offense fell within the court's jurisdiction.<sup>1085</sup> The court reaffirmed Shaw's right, as well as that of any defendant who pleads guilty, to file a motion to arrest judgment pursuant to Federal Rule of Criminal Procedure 34.<sup>1086</sup> Concluding that the Government failed to remove the appearance of vindictiveness, the court ordered the district court to reinstate Shaw's guilty plea to the single count of bribery.<sup>1087</sup>

In *United States v. Herrera*,<sup>1088</sup> the Ninth Circuit held that the Government's decision to proceed to trial on an indictment after offering to accept a guilty plea to a lesser charge did not constitute vindic-

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jurisdiction of appeals from all final decisions of the district courts of the United States, . . . except where a direct review may be had in the Supreme Court."

1076. 655 F.2d at 170.

1077. *Id.* at 170-71 (citing *United States v. Griffin*, 617 F.2d 1342 (9th Cir.), *cert. denied*, 449 U.S. 863 (1980)).

1078. 655 F.2d at 171.

1079. *Id.*

1080. *Id.*

1081. 417 U.S. 21, 28 (1974). *See supra* note 1050 and accompanying text.

1082. 655 F.2d at 171.

1083. *Id.* (citing *United States v. Heath*, 509 F.2d 16, 19 (9th Cir. 1974)).

1084. 655 F.2d at 171.

1085. *Id.*

1086. *Id.*

1087. *Id.* at 171-72.

1088. 640 F.2d 958 (9th Cir. 1981).

tive prosecution.<sup>1089</sup> Defendant Herrera and three co-defendants were indicted on ten counts of racketeering, conspiracy, and transportation of stolen property<sup>1090</sup> stemming from an alleged scheme to convert to the defendants' own use approximately \$5.5 million in union health insurance funds.<sup>1091</sup> All four defendants entered pleas of not guilty, and a trial date was set.<sup>1092</sup>

Shortly before the scheduled trial date, Herrera's counsel began plea negotiations with the Government. Counsel for both sides met and tentatively agreed that Herrera would plead guilty to one felony count if he could be assured that he would not lose his California contractor's license.<sup>1093</sup> If it appeared that the felony conviction would cause Herrera to lose that license, the parties agreed that he would plead guilty to a misdemeanor.<sup>1094</sup> Having reached an apparent plea agreement, the parties cancelled the trial.<sup>1095</sup>

It soon became clear, however, that the parties disagreed as to the terms of the plea agreement. Herrera contended that the Government had agreed to stipulate that under Federal Rule of Criminal Procedure 11(e)(1)(C),<sup>1096</sup> he would receive neither fine nor jail time if he pled guilty to a misdemeanor.<sup>1097</sup> The Government, however, contended that it had agreed to recommend no fine and no jail time.<sup>1098</sup> Under the Federal Rule of Criminal Procedure 11(e)(1)(B), a trial court is not bound to follow such a recommendation.<sup>1099</sup>

Herrera subsequently filed a motion to compel specific perform-

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1089. *Id.* at 961-62 & n.6.

1090. *Id.* at 960.

1091. *Id.* at 960 n.1.

1092. *Id.* at 960.

1093. *Id.*

1094. *Id.*

1095. *Id.*

1096. FED. R. CRIM. P. 11(e)(1) provides:

The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon entering a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

The court shall not participate in any such discussions.

1097. 640 F.2d at 960.

1098. *Id.*

1099. *See supra* note 1096.

ance of the plea agreement as he understood it.<sup>1100</sup> The trial court denied the motion, stating that: (1) it had a policy of not permitting the Government to agree to a sentence under rule 11(e)(1)(C);<sup>1101</sup> and (2) in any event, Herrera had failed to prove that the Government violated the plea agreement.<sup>1102</sup> In a telephone conversation with counsel for the Government, Herrera's counsel stated that Herrera would plead guilty in exchange for the Government's recommendation of probation.<sup>1103</sup> In a written reply, the Government informed Herrera's counsel that to prevent further misunderstanding, the Government would respond in writing to any written plea proposals submitted by Herrera.<sup>1104</sup> The Government further advised Herrera's counsel that if Herrera submitted no formal proposal, the case would proceed to trial.<sup>1105</sup> Herrera never submitted a written plea proposal.<sup>1106</sup>

Shortly before trial, Herrera filed a second motion to compel specific performance of the plea agreement, this time adopting the Government's original characterization of the agreement, which offered a misdemeanor plea in exchange for a recommendation of probation.<sup>1107</sup> In the alternative, he moved to dismiss on grounds of prosecutorial delay.<sup>1108</sup> Without ruling on Herrera's motion, and characterizing the Government's conduct as "vindictive prosecution of an outrageous nature," the trial court dismissed the indictment with prejudice.<sup>1109</sup> Following denial of its motion for reconsideration, the Government appealed.<sup>1110</sup>

The Ninth Circuit distinguished *Herrera* from the Supreme Court's decision in *Blackledge v. Perry*,<sup>1111</sup> stating that, unlike the *Blackledge* defendants, the Government had not taken action to penalize Herrera.<sup>1112</sup> The court reiterated the proposition that "[a] defendant's right to due process is violated whenever the Government 'increases the severity of the alleged charges in response to the exercise

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1100. 640 F.2d at 960.

1101. *Id.* at 960 n.4.

1102. *Id.*

1103. *Id.* at 960.

1104. *Id.*

1105. *Id.*

1106. *Id.*

1107. *Id.* at 960-61.

1108. *Id.* at 961.

1109. *Id.*

1110. *Id.*

1111. 417 U.S. 21 (1974); see *supra* note 1050 and accompanying text.

1112. 640 F.2d at 961.

of constitutional or statutory rights.'"<sup>1113</sup> The court noted, however, that the Government did not increase the severity of the charges against Herrera by deciding to proceed to trial on the ten-count indictment. Such an increase, the court observed, could only have occurred if any of the original charges had been dismissed, or if Herrera had been subjected to subsequent indictments.<sup>1114</sup>

Finally, the court stated that plea bargaining is not a constitutional right, and thus the Government can refuse to bargain altogether as well as terminate or limit negotiations if it chooses to do so.<sup>1115</sup> Therefore, the court concluded, neither the breach of a plea bargain nor the decision to terminate plea negotiations constitutes vindictive prosecution.<sup>1116</sup>

In *United States v. Moore*,<sup>1117</sup> the Ninth Circuit considered the validity of the defendant's claim that his prosecution was vindictive in nature because it was precipitated by the successful exercise of his constitutional right to resist extradition.<sup>1118</sup> He argued that *Blackledge v.*

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1113. *Id.* (quoting *United States v. Burt*, 619 F.2d 831, 836 (9th Cir. 1980)). See *United States v. Griffin*, 617 F.2d 1342, 1346-47 (9th Cir.), *cert. denied*, 449 U.S. 863 (1980); *United States v. Groves*, 571 F.2d 450, 453 (9th Cir. 1978); *United States v. Ruesga-Martinez*, 534 F.2d 1367, 1368-69 (9th Cir. 1976).

1114. 640 F.2d at 961.

1115. *Id.* at 962 (citing *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977)).

1116. 640 F.2d at 962. The Ninth Circuit relied on *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), to further support its conclusion. 640 F.2d at 962. In *Bordenkircher*, the prosecution indicated during the course of plea bargaining that it would indict the defendant under the Habitual Criminal Act if he did not plead guilty. 434 U.S. at 358. The defendant refused to enter a guilty plea, and the Government charged him under the recidivist statute. *Id.* at 359. The Supreme Court held that such action did not constitute a denial of due process. *Id.* at 365. The *Herrera* court concluded that if the Government could constitutionally reindict the defendant on more serious charges after offering to accept a plea agreement, as in *Bordenkircher*, then the Government could proceed on the full range of charges in the original indictment. 640 F.2d at 962.

The *Herrera* court did not, however, decide whether there was actually a plea agreement. *Id.* The court noted that had such an agreement existed, and had that agreement been breached, the remedy of specific performance would have been available to the defendant. *Id.* (citing *Santobello v. New York*, 404 U.S. 257, 262-63 (1971)). The court observed that under such circumstances Herrera could have renewed his motion for specific performance on remand. 640 F.2d at 962.

1117. 653 F.2d 384 (9th Cir.), *cert. denied*, 454 U.S. 1102 (1981).

1118. *Id.* at 387. While serving a life sentence for murder in a prison in Belize (formerly British Honduras), Moore met Dail, a fellow prisoner. Dail offered to help Moore escape from prison, to help pay for his return to the United States, and to pay him \$20,000 if Moore would murder one Hudson, who had testified against one of Dail's business associates. Moore accepted the offer, escaped from the Belize prison, and presented himself to an agent of the Drug Enforcement Administration (DEA) in Guatemala City. He then offered to become an informer against Dail. *Id.* at 386.

The DEA accepted Moore's offer and arranged for him to return to the United States

*Perry*,<sup>1119</sup> *North Carolina v. Pearce*,<sup>1120</sup> and *United States v. Groves*<sup>1121</sup> precluded his prosecution for violation of 18 U.S.C. section 201(e).<sup>1122</sup>

where he would pretend to seek out and kill Hudson while gathering evidence against Dail. Dail had also returned to the United States, and many telephone conversations between Moore and Dail were recorded. The DEA monitored the deliveries of weapons which Dail made to Moore. Moore then faked Hudson's murder convincingly enough to induce Dail to pay him for the murder and to seek to have Moore murder other individuals. *Id.*

Moore appeared before a federal grand jury and was arrested approximately one month later on a warrant for his extradition to Belize. He was held for forty-five days and then released because the extradition papers had not arrived within this period. *Id.*

Shortly thereafter, one of Dail's associates discovered that Hudson, whom Moore was supposed to have murdered, was still alive. To protect Moore the Government had Dail arrested and charged with conspiracy to commit murder and interstate transportation of guns to commit a felony. *Id.* Dail pled guilty to one count of a two-count indictment and was sentenced to a term of eight years. *Id.* at 386 n.1.

At this point Moore began to consider those who might have an interest in Dail's avoidance of successful prosecution. Moore and his wife commenced a series of telephone calls to Dail's wife and one of Dail's business associates, offering not to testify in Dail's trial in exchange for a sum of cash. The DEA learned of these conversations, which had been recorded, and confronted Moore, concerned that he would destroy its case against Dail. Moore produced the tapes of these calls, claiming that he was attempting to incriminate other members of Dail's organization. Unconvinced, the DEA told Moore not to make any more calls to Dail's wife. *Id.* at 386.

Although Moore agreed in writing not to make these calls, he violated this agreement and was arrested and charged with violating 18 U.S.C. § 201(e) (1976). After his arraignment, the Government offered Moore a plea bargain under which he would plead guilty to one count of violating § 201(e), in return for which the Government would request that Belize withdraw its extradition request, would not initiate extradition proceedings upon his release as long as he did not violate any federal or state law, would recommend a sentence of five years, and would not prosecute Moore's wife for her participation in the telephone calls to Dail's wife and associate. To encourage Moore to accept this offer, the Government indicated that if he rejected it, the indictment would be dismissed and extradition proceedings instituted, which the Government believed would be successful. Moore rejected the offer, and the Government began extradition proceedings. *Id.* at 386-87.

However, the Government encountered a serious obstacle in its effort to penalize Moore with extradition: during the extradition proceedings, the district court refused to order Moore's extradition. In response to this obstacle, the Government again arrested Moore and obtained a second indictment against him, charging him with three counts of violating § 201(e), and charging him and his wife with conspiracy to violate § 201(e). The trial resulted in the acquittal of Moore and his wife on the latter charge and conviction of Moore on the § 201(e) counts. *Id.* at 387.

1119. 417 U.S. 21 (1974); see *supra* note 1050 and accompanying text.

1120. 395 U.S. 812 (1969); see *supra* note 1050 and accompanying text.

1121. 571 F.2d 450 (9th Cir. 1978) (appearance of vindictiveness sufficient to evoke rule of *Blackledge*). See also *supra* note 1054 and accompanying text.

1122. 653 F.2d at 387. 18 U.S.C. § 201(e) (1976) provides:

Whoever, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity in return for being influenced in his testimony under oath or affirmation as a witness upon any such trial, hearing, or other proceeding, or in return for absenting himself therefrom—

Shall be fined not more than \$20,000 or three times the monetary equivalent

The Government contended that prosecuting Moore was the only remaining alternative following Moore's rejection of the plea offer and following its failure to extradite.<sup>1123</sup>

The Ninth Circuit held that Moore's prosecution was not vindictive<sup>1124</sup> under the standards set forth by the United States Supreme Court in *Bordenkircher v. Hayes*.<sup>1125</sup> In *Bordenkircher*, the Supreme Court held that the Government could, as part of a plea negotiation, inform the defendant of its intention to reindict him on a more serious charge if he refused to plead guilty to the charge contained in the original indictment.<sup>1126</sup>

Although the plea offer the Government made to Moore did not explicitly state that Moore would be prosecuted if he rejected the offer and the extradition efforts failed, the court reasoned that the Government had not made the threat because it fully expected the extradition to succeed.<sup>1127</sup> The court clarified that this case came within the framework of *Bordenkircher* because a threat to prosecute Moore could be reasonably implied under the circumstances surrounding the plea offer.<sup>1128</sup>

#### 8. Dismissal for prosecutorial misconduct (pretrial)

The fifth amendment mandates that a grand jury indictment be returned before a federal criminal prosecution may proceed.<sup>1129</sup> The grand jury "has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused."<sup>1130</sup>

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of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

1123. 653 F.2d at 387.

1124. *Id.*

1125. 434 U.S. 357 (1978).

1126. *Id.* at 365. *Accord* *Corbitt v. New Jersey*, 439 U.S. 212 (1978).

1127. 653 F.2d at 388.

1128. *Id.* Moore could not reasonably have expected that he and his wife would be free from all prosecution for "marketing" his testimony merely because extradition efforts had failed. *Id.* The *Moore* court also commented that had Moore and his counsel thoroughly considered the Government's plea offer, the existence of the Government's secondary threat could not have been in doubt. *Id.* The court further reasoned that even if Moore's wife's prosecution arguably could have fallen outside the limits of *Bordenkircher* and *Corbitt*, the Moores' acquittal of the conspiracy charge expunged any taint of vindictiveness that might have been attached to her prosecution. *Id.*

1129. U.S. CONST. amend. V ("No person shall be held to answer to a capital, or otherwise infamous crime, unless on a presentation or indictment of a Grand Jury . . .").

1130. *Wood v. Georgia*, 370 U.S. 375, 390 (1962).



The grand jury, however, is not subject to the same procedural restrictions imposed on trial courts,<sup>1131</sup> and certain rules of evidence devised to protect the accused are inapplicable to grand jury proceedings.<sup>1132</sup> Moreover, although the purpose of the grand jury is to protect the accused from unfounded or persecutorial prosecution, indictment proceedings are normally mere formalities.<sup>1133</sup>

The Ninth Circuit has been reluctant to dismiss grand jury indictments for prosecutorial misconduct<sup>1134</sup> and two recent decisions illustrate no break with precedent. In *United States v. Cederquist*,<sup>1135</sup> the defendants were indicted for the substantive crime of mail fraud, as well as aiding and abetting in that offense.<sup>1136</sup> The indictment alleged that the defendants made use of the mails to defraud various banks through the operation of a check kiting scheme.<sup>1137</sup> The district court dismissed the indictment on the grounds of prejudicial misconduct before the grand jury.<sup>1138</sup>

On appeal, the Ninth Circuit held that the prosecutor's conduct did not significantly affect the grand jury.<sup>1139</sup> Although the court recognized that an indictment may be dismissed for prosecutorial misconduct based upon the fifth amendment due process clause,<sup>1140</sup> or upon the court's inherent supervisory powers,<sup>1141</sup> the court stated that the "constitutionally-based independence of grand juries and prosecutors necessarily limits a court's review of grand jury proceedings."<sup>1142</sup> As a prerequisite to a dismissal for prosecutorial misconduct, it must be shown that the prosecutor's conduct significantly infringed upon the

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1131. See *United States v. Calandra*, 414 U.S. 338, 343 (1974).

1132. See, e.g., *United States v. Romero*, 585 F.2d 391, 399 (9th Cir. 1978) ("[I]t is well established that a grand jury may return an indictment based solely on hearsay evidence.").

1133. See generally *Costello v. United States*, 350 U.S. 359 (1956).

1134. In *United States v. Chanen*, 549 F.2d 1306 (9th Cir.), cert. denied, 434 U.S. 825 (1977), the Ninth Circuit stated that it would not overturn an indictment unless prejudicial misconduct by the prosecutor resulted in an intrusion on the defendant's constitutional rights. *Id.* at 1311.

1135. 641 F.2d 1347 (9th Cir. 1981).

1136. *Id.* at 1350.

1137. *Id.*

1138. *Id.* The prosecution presented a previously prepared indictment to the grand jury. The district court found that this action resulted in an unconstitutional "influence exerted on the grand jury to the effect that [defendants] . . . in the mind of the prosecutor, were probably guilty and should be charged." *Id.* at 1350 n.1.

1139. *Id.* at 1353.

1140. *Id.* at 1352 (citing *United States v. Basurto*, 497 F.2d 781 (9th Cir. 1974)).

1141. 641 F.2d at 1352 (citing *United States v. Chanen*, 549 F.2d 1306, 1309 (9th Cir.), cert. denied, 434 U.S. 825 (1977)).

1142. 641 F.2d at 1352.

ability of the grand jury to exercise its independent judgment.<sup>1143</sup> The court stated that the "[d]ismissal of an indictment is required only in flagrant cases in which the grand jury has been overreached or deceived in some significant way."<sup>1144</sup> The court applied the above standard strictly and allowed the indictment to stand on the grounds that the prosecutor's conduct had no significant effect on the grand jury,<sup>1145</sup> and that the submission of the indictment to the grand jury prior to the close of testimony was proper as long as the grand jury had reviewed the indictment and adopted it as its own.<sup>1146</sup>

### B. Extradition

Extradition occurs when a state surrenders to a foreign state an individual accused or convicted of an offense committed within the foreign jurisdiction. Certification of extradition can be appealed through habeas corpus proceedings, but the review is restricted to whether: (1) the extraditing judge had jurisdiction to conduct extradition proceedings; (2) the extraditing court had jurisdiction over the fugitive; (3) the treaty of extradition was in force; (4) the criminal offense was subject to the treaty; and (5) competent legal evidence to support a finding of extraditability existed.<sup>1147</sup> The Ninth Circuit has recently considered appeals in which petitioners, certified as extraditable, have been denied habeas corpus relief and have challenged the applicability of certain extradition treaties to their particular offenses.

In *Cucuzzella v. Keliikoa*,<sup>1148</sup> petitioner Cucuzzella appealed the certification of his extradition to Canada. Cucuzzella had allegedly agreed in Vancouver to procure a mortgage for S.L. Scheves.<sup>1149</sup>

1143. *Id.* See *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979) (prosecutor intentionally submitted transcript extremely prejudicial to defendant, resulting in indictment that was deemed serious threat to judicial integrity); *United States v. Chanen*, 549 F.2d 1306 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977) (reading transcripts of sworn testimony does not constitute fundamental unfairness or threat to judicial integrity).

1144. 641 F.2d at 1352-53 (quoting *United States v. Thompson*, 576 F.2d 784, 786 (9th Cir. 1978)).

1145. 641 F.2d at 1353. "Grand jurors, as a practical matter, . . . are aware that a case is being presented to them because the prosecutor feels that an indictment is warranted. Thus the fact that a prosecutor conveys such an impression to the grand jury does not require the dismissal of the indictment." *Id.* The court also rejected the defendant's claim that the prosecutor's use of such words as "check-kiting" biased the grand jury. *Id.*

1146. *Id.* (citing *United States v. Chanen*, 549 F.2d 1306, 1312 (9th Cir.), *cert. denied*, 434 U.S. 825 (1977)).

1147. *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925). *E.g.*, *Hooker v. Klein*, 573 F.2d 1360, 1368 (9th Cir.), *cert. denied*, 439 U.S. 932 (1978).

1148. 638 F.2d 105 (9th Cir. 1981).

1149. *Id.* at 105.

Scheves had paid Cucuzzella an \$11,000 commission, but Cucuzzella neither procured the mortgage nor refunded the commission.<sup>1150</sup> A few months later, Cucuzzella entered into a similar agreement with A.W. Deitcher, with the same result.<sup>1151</sup>

The Canadian Government charged Cucuzzella with one count of theft and one count of criminal breach of trust for each transaction.<sup>1152</sup> When Cucuzzella failed to appear for trial in Vancouver, the United States Attorney, on behalf of Canada, filed documents for extradition on all four counts. Cucuzzella was then certified for extradition in the district court of Hawaii.<sup>1153</sup> He appealed his certification on the grounds that: (1) the extradition documents were improperly authenticated under the provisions of the extradition treaty between the United States and Canada and under the United States Code; and (2) criminal breach of trust was not an extraditable offense under the treaty's provisions.<sup>1154</sup>

Cucuzzella based his first argument on the treaty requirement that evidence supporting an extradition request be authenticated by a Canadian officer and certified by a United States officer,<sup>1155</sup> and on a United States Code requirement that such evidence be "properly and legally authenticated so as to entitle . . . [it] to be received for similar purposes in the tribunals" of the requesting country.<sup>1156</sup> The documents seeking

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1150. *Id.*

1151. *Id.*

1152. *Id.* at 105-06.

1153. *Id.* at 106.

1154. *Id.*

1155. The treaty specifically provides:

(1) Extradition shall be granted only if the evidence be found sufficient, according to the laws of the place where the person sought shall be found . . . to justify his committal for trial if the offense of which he is accused had been committed in its territory . . . .

(2) The documentary evidence in support of a request for extradition or copies of these documents shall be admitted in evidence in the examination of the request for extradition when, in the case of a request emanating from Canada, they are authenticated by an officer of the Department of Justice of Canada and are certified by the principal diplomatic or consular officer of the United States in Canada . . . .

Extradition Treaty, Dec. 3, 1971, United States-Canada, art. X, 27 U.S.T. 985, 991, T.I.A.S. No. 8237 at 9.

1156. The United States Code specifically provides:

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence . . . if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required.

Cucuzzella's extradition were signed and sealed by the Associate Deputy Minister of Justice for Canada and were accompanied by a Certificate of Authenticity, attesting that the indictment, information, arrest warrants, and affidavits were proper, authorized, and "admissible in evidence in Canadian Courts."<sup>1157</sup> The United States Ambassador had certified the papers as "legally authenticated so as to entitle them to be received in evidence for similar purposes by the tribunals of Canada."<sup>1158</sup> Cucuzzella contended that these documents were improperly authenticated because the Canadian Certificate of Authenticity did not conform to the language of the United States Code, requiring the documents to be "properly and legally authenticated" and to be admissible "for similar purposes" under the law of the requesting state.<sup>1159</sup>

The Ninth Circuit, finding the omissions from the Canadian Certificate to be trivial, rejected this contention.<sup>1160</sup> The court determined that since there existed no proof of lack of authenticity, the documents had provided a sufficient basis for the United States Ambassador's certification.<sup>1161</sup>

Cucuzzella based his second argument on the treaty requirement that extraditable offenses be "punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year."<sup>1162</sup> He contended that criminal breach of trust was not an extraditable offense because no comparable offense was proscribed by either federal or state law in the United States.<sup>1163</sup> However, the Ninth Circuit determined that offenses comparable to criminal breach of trust were proscribed by United States law.<sup>1164</sup> The court relied on *Collins v. Loisel*,<sup>1165</sup> in which

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18 U.S.C. § 3190 (1976).

1157. 638 F.2d at 106.

1158. *Id.*

1159. *Id.*

1160. *Id.* at 107.

1161. *Id.* (citing *Shapiro v. Ferradina*, 478 F.2d 894, 904 (2d Cir.), *cert. dismissed*, 414 U.S. 884 (1973)). In *Shapiro*, the United States Ambassador failed in his extradition certification specifically to mention certain papers showing the petitioner's guilt. However, the attachment of these papers to documents which *were* mentioned in the certificate convinced the court that the ambassador had intended to certify the unmentioned papers. The Second Circuit held that in the absence of any showing that the extradition documents were not authentic, the United States Ambassador's certification was satisfactory. *Id.* at 903-04.

1162. The treaty specifically provides that "[p]ersons shall be delivered up according to the provisions of this Treaty for any of the offenses listed in the Schedule annexed to this Treaty . . . provided these offenses are punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year." Extradition Treaty, Dec. 3, 1971, United States-Canada, art. II, para. 1, 27 U.S.T. 985, 986, T.I.A.S. No. 8237 at 4.

1163. 638 F.2d at 108.

1164. *Id.*

1165. 259 U.S. 309 (1922).

the Supreme Court held that "[t]he law does not require that the name by which the crime is described in the two countries shall be the same, nor that the scope of the liability shall be coextensive, or, in other respects, the same in the two countries."<sup>1166</sup> The *Cucuzzella* court further observed that the treaty language itself provided for some flexibility.<sup>1167</sup>

In its analysis of criminal breach of trust, the court established the necessity of examining the extraditability of each charged offense rather than of each act.<sup>1168</sup> The court rejected the proposition that the expression, "the laws of both Contracting Parties" refers to state law or, in this case, to the law of Hawaii.<sup>1169</sup> Instead, it adopted the First Circuit's rule that when a treaty between the United States and a foreign country refers to the laws of the "Contracting Parties," the United States courts should look to proscription by federal law or, if none exists, to the law of the jurisdiction where the fugitive is found or to the law of the majority of the states.<sup>1170</sup> The *Cucuzzella* court concluded

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1166. *Id.* at 312. In *Collins*, the Indian Government had charged the petitioner with "cheating." The petitioner claimed that such an offense did not appear in the applicable treaty's list of extraditable crimes, and was not recognized as a crime in the state requesting his extradition (Louisiana). The Court, however, determined that "cheating," as defined by the Indian Penal Code, contained the same elements as the crime of "obtaining property by false pretenses," which was recognized by both the treaty and Louisiana. Hence, "cheating" was held to be an extraditable offense. *Id.*

1167. 638 F.2d at 108 n.4. The treaty provides:

Extradition shall also be granted for any offense against a federal law of the United States in which one of the offenses listed in the annexed Schedule . . . is a substantial element, even if transporting, transportation, the use of mails or interstate facilities are also elements of the specific offense.

Extradition Treaty, Dec. 3, 1971, United States-Canada, art. II, para. 3, 27 U.S.T. 985, 986, T.I.A.S. No. 8237 at 4.

1168. 638 F.2d at 107 (citing *Shapiro v. Ferrandina*, 478 F.2d 894, 907, 909 (2d Cir.), *cert. denied*, 414 U.S. 884 (1973)). In *Shapiro*, the Second Circuit held that it is necessary to determine not only whether the alleged criminal acts are proscribed by similar criminal provisions in the United States, but also whether the alleged offenses of foreign law correspond to parallel United States offenses. The Second Circuit adopted this rule because of its concern that, when multiple offenses have been charged for each act, there exist the "potential problems of greatly increased punishment through successive sentences." 478 F.2d at 909.

The First Circuit has recognized the same problems but has specifically held that, when only a single offense has been charged for each act, it is only necessary to determine whether the alleged criminal act is proscribed by similar criminal provisions in the United States. *Brauche v. Raiche*, 618 F.2d 843, 851 (1st Cir. 1980).

1169. 638 F.2d at 107.

1170. *See Brauche v. Raiche*, 618 F.2d 843, 851 (1st Cir. 1980). The Second Circuit has also looked to federal law when the pertinent treaty required that extraditable offenses be punishable by the laws of both "Contracting Parties." *Shapiro v. Ferrandina*, 478 F.2d 894, 910 (2d Cir.), *cert. denied*, 414 U.S. 884 (1973). However, the *Shapiro* court looked to federal law, not because the term "Contracting Party" should always be interpreted as referring

that the Canadian breach of trust statute<sup>1171</sup> was analogous to federal embezzlement statutes.<sup>1172</sup> Because these statutes provide for maximum prison terms of ten years, the Ninth Circuit held that criminal breach of trust constituted an extraditable offense.<sup>1173</sup>

In *Caplan v. Vokes*,<sup>1174</sup> petitioner Caplan appealed the certification of his extradition to the United Kingdom. A California district court had certified Caplan on all but the first of sixty charges filed on behalf of the British Government. The charges included theft, forgery, and false accounting in the management of a collapsed London financial firm.<sup>1175</sup> Caplan appealed his certification on the grounds that: (1) his extradition on charges two through twenty-one was barred by the statute of limitations under the extradition treaty between the United States and the United Kingdom and under the United States Code; and (2) the facts found under charges twenty-two through sixty did not establish extraditable offenses under the treaty's provisions.<sup>1176</sup>

Caplan based his first argument on the treaty requirement that extradition be prohibited on any charge for which "prosecution . . . has become barred by lapse of time according to the law of the requesting . . . Party,"<sup>1177</sup> and on the United States Code requirement that non-capital crimes be charged within five years.<sup>1178</sup> The petitioner's arrest warrant was dated May 18, 1978, thus rendering any acts committed

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to the federal government, but because the charged offense fell within the treaty only as it was proscribed by federal, not state, law. *Id.* at 909-10. The *Shapiro* court also considered the extraditability of a different offense as proscribed by state law and completely neglected to consider its proscription by federal law. *Id.* at 910-11. This approach has led other Second Circuit courts to hold that an alleged offense need only be examined as proscribed by state law, even when the term "Contracting Party" seems to indicate that federal law should be applied. *Jhirad v. Ferrandina*, 362 F. Supp. 1057, 1063 (S.D.N.Y.), *aff'd on other grounds*, 536 F.2d 478 (2d Cir. 1973).

1171. The Canadian statute provides that a breach of trust has occurred when "one who, being a trustee of anything for the use or benefit . . . of another person . . . converts, with intent to defraud and in violation of his trust, that thing . . . to a use that is not authorized by the trust." CAN. REV. STAT. ch. c-34 § 296 (1970).

1172. 638 F.2d at 108 (citing *Jhirad v. Ferrandina*, 355 F. Supp. 1155, 1160 (S.D.N.Y.), *rev'd on other grounds*, 486 F.2d 442 (2d Cir. 1973)). In *Jhirad*, the Second Circuit determined that the Indian statute proscribing the offense of "breach of trust" was, in essence, the crime of embezzlement, an extraditable offense under the extradition treaty between the United States and India. *Id.* at 1160.

1173. 638 F.2d at 108.

1174. 649 F.2d 1336 (9th Cir. 1981).

1175. *Id.* at 1338.

1176. *Id.* at 1340.

1177. Extradition Treaty, June 8, 1972, United States-United Kingdom, art. V, § 1(b), 28 U.S.T. 229, 230, T.I.A.S. No. 8468 at 4.

1178. 18 U.S.C. § 3282 (1976).

prior to May 18, 1973, possibly barred by the statute of limitations.<sup>1179</sup> Charge two alleged the maintenance of a fictitious bank account between February 1968 and December 1973, and charges three through twenty-one alleged the commission of acts which occurred no later than April of 1973.<sup>1180</sup> Caplan contended, therefore, that the five year statute of limitations barred his extradition on charges three through twenty-one and on that part of charge two accruing before May 18, 1973.<sup>1181</sup>

The Ninth Circuit's primary inquiry into this argument concerned whether the tolling provision in the United States Code, providing that "[n]o statute of limitations shall extend to any person fleeing from justice,"<sup>1182</sup> applied to Caplan. Caplan had moved from England to France shortly after the British Government completed its investigation into his business affairs.<sup>1183</sup> The Government maintained that Caplan had intended to evade arrest because: (1) the British Government's investigation had alerted him to the possibility of ensuing criminal charges; and (2) his move to France had made his arrest more difficult.<sup>1184</sup>

The court reviewed the requirement that "to establish that an accused was 'fleeing from justice' . . . the prosecution must meet the burden of proving that the accused concealed himself with the intent to avoid arrest or prosecution."<sup>1185</sup> It concluded that the Government

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1179. 649 F.2d at 1340.

1180. *Id.*

1181. *Id.*

1182. 18 U.S.C. § 3290 (1976).

1183. 649 F.2d at 1341.

1184. *Id.*

1185. *Id.* (quoting *United States v. Wazney*, 529 F.2d 1287, 1289 (9th Cir 1976)). In *Wazney*, the Ninth Circuit specifically rejected the position taken by the District of Columbia and Eighth Circuits that mere absence from the jurisdiction where an offense occurred is enough to toll the statute of limitations. *Id.* at 1289. See *King v. United States*, 144 F.2d 729, 731 (8th Cir.), *cert. denied*, 324 U.S. 854 (1944); *McGowen v. United States*, 105 F.2d 791, 792 (D.C. Cir.), *cert. denied*, 308 U.S. 552 (1939). Instead, the *Wazney* court adopted the rule of the First, Second, and Fifth Circuits, which requires that specific intent to avoid arrest or prosecution be established to toll the statute of limitations. 529 F.2d at 1289. See *Jhirad v. Ferrandina*, 486 F.2d 442, 444 (2d Cir. 1973); *Donnell v. United States*, 229 F.2d 560, 565 (5th Cir. 1956); *Brouse v. United States*, 68 F.2d 294, 295-96 (1st Cir. 1933); *Greene v. United States*, 154 F. 401, 411 (5th Cir.), *cert. denied*, 207 U.S. 596 (1907); *Porter v. United States*, 91 F. 494, 496 (5th Cir. 1898). The *Wazney* court stated:

The statute of limitations is made inapplicable whenever an accused flees from justice because the failure to prosecute is attributable to the unacceptable conduct of the accused. The accused should not be held responsible, however, for unintentional and innocent delays, such, for example, as one caused by an open move to a new residence where the accused is readily accessible to careful law enforcement officers.

had not met its burden of proof.<sup>1186</sup> The court stated that the Government's first argument was negated by evidence of Caplan's open behavior before and after his move.<sup>1187</sup> The court further noted that adopting the Government's second argument would abolish the requirement of specific intent.<sup>1188</sup> The Ninth Circuit held, therefore, that Caplan was not a "fugitive from justice" and that the statute of limitations barred his extradition on charges three through twenty-one and on a portion of charge two.<sup>1189</sup>

Caplan based his second argument, that the facts did not establish extraditable offenses, on the "principle of dual criminality": extraditable offenses must be criminal in both the United States and the United Kingdom.<sup>1190</sup> Charges twenty-two through sixty accused Caplan of violating several sections of the British Theft Act.<sup>1191</sup> Caplan contended that the facts "found" by the extradition court<sup>1192</sup> did not establish an

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529 F.2d at 1289.

1186. 649 F.2d at 1341-42.

1187. *Id.* at 1341. Caplan had apparently notified the British Government of his impending move several months before his departure in 1974. He had used his true name and address while conducting business in France and had returned to England for short periods in 1975 and 1977. Caplan's behavior had been equally honest during his move from France to Monaco in 1975 and during his move from Monaco to California in 1976. The court determined, pursuant to *Wazney*, that such behavior did not constitute "unacceptable conduct" and had not been the cause of the Government's delay in prosecution. *Id.*

1188. *Id.* The court stated that the Government's second argument implied that petitioner could not have left England under any circumstances during the statute of limitations period, and that the Government did not have any burden of diligence. *Id.* at 1342.

1189. *Id.*

1190. *Id.* at 1343. The treaty specifically provides that:

(1) Extradition shall be granted for an act or omission the facts of which disclose an offense within any of the descriptions listed in the Schedule annexed to this Treaty, which is an integral part of the Treaty or any other offense, if:

(a) the offense is punishable under the laws of both Parties by imprisonment . . . for more than one year or by the death penalty;

(b) the offense is extraditable under the . . . law of the United Kingdom . . . ; and

(c) the offense constitutes a felony under the law of the United States of America.

Extradition Treaty, June 8, 1972, United States-United Kingdom, art. III, § 1, 28 U.S.T. 229, 229-30, T.I.A.S. No. 8468 at 3-4.

1191. 649 F.2d at 1342 (citing Theft Act, 1968, ch. 60, §§ 1, 16, 17, 19). Caplan was charged with theft, false accounting, the publication of a misleading, false, or deceptive statement of account with an intent to deceive, and the dishonest obtaining of a pecuniary advantage. Most of these charges arose from a series of transactions referred to as "warehousing," involving the purchase of shares in the names of nominee holders and the subsequent transfer of funds to cover the costs of the purchases. 649 F.2d at 1342.

1192. *Id.* The *Caplan* court noted that the "findings" of an extradition court are not true findings of fact because an extradition court does not weigh the evidence and resolve disputed factual issues. *Id.* at 1342 n.10. The function of the extradition court is merely to determine whether there is "any evidence warranting the finding that there was a reasonable



actual violation of the Act; thus, his extradition under charges twenty-two through sixty was prohibited.<sup>1193</sup>

The Ninth Circuit first observed that the "principle of dual criminality" and the "principle of speciality" could not be satisfied without making a specific determination of the extraditability of each charge.<sup>1194</sup> The court found that the record did not indicate the extradition court's rationale for its determinations of extraditability: there were no coherent legal connections between the factual allegations and the extraditable offenses, and nothing in the record specifically demonstrated that Caplan's alleged acts constituted crimes in either England or the United States.<sup>1195</sup> The court of appeals, therefore, remanded for a more complete examination of each charge, admonishing the extradition court that:

[A]n adequate extradition proceeding must include in its record a specific delineation, as to each charge, of the legal theories under the requesting country's law by which the accused's conduct is alleged to constitute an extraditable offense, together with an identification of the corresponding offenses in this country relied on to show that the "dual criminality" requirement has been met.<sup>1196</sup>

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ground to believe the accused guilty." *Id.* (citing *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925)). Thus, the findings of the extradition court serve only to indicate those items of evidence, submitted by the requesting country, on which to base the decision to certify. 649 F.2d at 1342 n.10.

1193. *Id.* at 1342. The *Caplan* court distinguished *Cucuzzella* in that *Cucuzzella* never questioned the criminality of his charged conduct in Canada, but argued instead that there was no comparable offense in the United States. *Caplan*, on the other hand, refused to concede that his conduct was criminal in any jurisdiction. *Id.* at 1342 n.11 (citing 638 F.2d at 107-08).

1194. 649 F.2d at 1343. The "principle of specialty" limits prosecution in the requesting country to those offenses for which extradition has been granted by the asylum country. The treaty specifically provides that "[a] person extradited shall not be detained or proceeded against in the territory of the requesting Party for any offense other than an extraditable offense established by the facts in respect of which his extradition has been granted." Extradition Treaty, June 8, 1972, United States-United Kingdom, art. XII, § 1, 28 U.S.T. 229, 233, T.I.A.S. No. 8468 at 7.

1195. 649 F.2d at 1344. The court noted that the extradition court's sole finding regarding whether the charged offenses were extraditable consisted of the following statements:

The sixty charges contained in the London arrest warrant are ones enumerated within the . . . extradition treaty . . . as being of an extraditable nature. . . . The charges contained in the London arrest warrant are offenses which are also considered unlawful in this jurisdiction and would subject an offender to a possible sentence in excess of one year imprisonment.

*Id.* at 1343.

1196. *Id.* at 1344-45. The court emphasized that it was not an appellate court's function to furnish the connections between the factual allegations and the extraditable offenses; such an attempt to cure a substantial deficiency would result in an inefficient and, without full

The Ninth Circuit's extraditability decisions establish that, before an individual may be certified for extradition, he must have committed acts in the requesting country which constitute criminal offenses in both that country and the United States. Once this threshold requirement has been met, the Ninth Circuit exercises some flexibility in its analysis of other factors determining extraditability. Defenses such as expiration of the statute of limitations are, of course, accepted as sufficient to rebut a certification of extraditability, but trivial errors in certificates accompanying extradition documents are accorded little weight. Similarly, a lack of absolute identity between the statute violated in the requesting country and the corresponding statute in the United States is not considered fatal to extraditability. As long as the statute violated proscribes the same type of conduct as that proscribed in the United States, the Ninth Circuit will certify an individual's extraditability.

### C. *Change of Venue*

In *United States v. Flores-Elias*,<sup>1197</sup> the Ninth Circuit considered whether the denial of a motion for change of venue based on pretrial publicity resulted in unconstitutional prejudice.<sup>1198</sup> Flores-Elias was convicted of smuggling illegal aliens from El Salvador to the United States. Widespread media coverage surrounding the tragic deaths of thirteen illegal aliens in the Arizona desert prompted the defendant to move for a change of venue. The defendant asserted on appeal that he had been unconstitutionally prejudiced by the denial.<sup>1199</sup>

The Ninth Circuit noted that a district court is granted broad discretion in ruling on a change of venue, and that its determination will not be altered absent an abuse of that discretion.<sup>1200</sup> The court then

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adversary participation, error-prone application of time and energy. *Id.* at 1344. The *Caplan* court also expressed doubt that charges 55 through 59, accusing Caplan of false accounting, could be considered extraditable. It observed that the Government had already conceded that charges 56 and 58 were not extraditable and that a British judge had acquitted Caplan's co-defendants of similar charges because the acts allegedly committed were a common occurrence among English banks. *Id.* at 1344 n.17.

1197. 650 F.2d 1149 (9th Cir. 1981).

1198. *Id.* at 1150. A trial judge is required to grant a motion for change of venue when "there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district." FED. R. CRIM. P. 21(a).

1199. 650 F.2d at 1150. Defendant also contended that the district court erred in rejecting his juror challenges, and that it conducted an inadequate voir dire. *Id.*

1200. *Id.* at 1151. See *United States v. Dreitzler*, 577 F.2d 539, 552 (9th Cir. 1978) (upholding district court's denial of change of venue motion despite extensive local media coverage of trial), *cert. denied*, 440 U.S. 921 (1979).

determined that such an abuse did not exist in the instant case.<sup>1201</sup> The publicity focused on the El Salvadorean victims, rather than on the defendant,<sup>1202</sup> and it "was largely factual, not emotional or accusatory."<sup>1203</sup> Moreover, although two of the jurors had heard of the case, neither had formed an opinion as to the defendant's guilt.<sup>1204</sup> The court thus concluded that the defendant demonstrated neither "inherent [n]or actual prejudice from the publicity," and affirmed the judgment of the district court.<sup>1205</sup>

#### *D. Defendant's Right to Discovery*

In *Brady v. Maryland*,<sup>1206</sup> the Supreme Court firmly established a federal defendant's right to discover prosecutorial evidence favorable to his or her defense. If the prosecution refuses to disclose exculpatory information requested by the defendant, due process is violated, even if the prosecution is acting in good faith.<sup>1207</sup>

This term the Ninth Circuit addressed a variety of issues pertaining to the defendant's right to discovery: the disclosures of an informant's identity, a victim's FBI record, illegally obtained wiretap information, the use of the deposition testimony of a key Government witness, the production of statements of witnesses whom the Government initially did not intend to call as witnesses, and the existence of prejudice resulting from the Government's failure to comply with a discovery rule.

In *United States v. Buras*,<sup>1208</sup> the Ninth Circuit affirmed defendant Buras' conviction on four counts of willful failure to file an income tax return in violation of 26 U.S.C. section 7203.<sup>1209</sup> The court also affirmed the district court's denial of Buras' motion for discovery of the informant who disclosed his violation to the Internal Revenue Service.<sup>1210</sup>

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1201. 650 F.2d at 1151.

1202. *Id.* at 1150. Only one article referred to the defendant by name.

1203. *Id.*

1204. *Id.* at 1151.

1205. *Id.*

1206. 373 U.S. 83 (1963).

1207. *Id.* at 87.

1208. 633 F.2d 1356 (9th Cir. 1980).

1209. *Id.* at 1358. 26 U.S.C. § 7203 (1976) provides in pertinent part:

Any person required under this title to pay any estimated tax . . . who willfully fails to pay such estimated tax . . . at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

1210. 633 F.2d at 1360.

Buras had filed income tax returns listing wages earned as a freelance truck driver as income for eight years before 1974. Tax was withheld from his paychecks during this time. Between 1974 and 1977 Buras did not file tax returns, having concluded that the tax laws did not require him to report wages as income. Although he earned between \$11,000 and \$21,000 during this time, Buras filed withholding certificates (Form W-43) so that no tax would be withheld from his paychecks.<sup>1211</sup>

On a motion to discover the identity of the individual who had notified the I.R.S. of his actions, Buras argued that the informant could have provided information bearing on whether his failure to file was willful or in good faith.<sup>1212</sup> The Ninth Circuit applied the standard established by the Supreme Court in *Roviaro v. United States*<sup>1213</sup> in determining whether the district court acted properly in denying Buras' motion.<sup>1214</sup> The *Roviaro* Court held that disclosure of an informant's identity is required when the identity "is relevant and helpful" to the accused's defense "or is essential to a fair determination of a cause."<sup>1215</sup> The Court noted that the crime charged, possible defenses, and the significance and materiality of the informant's testimony were relevant factors for consideration.<sup>1216</sup> The Ninth Circuit held that Buras had not met the *Rovario* test: his request was based on unfounded suspicion and conjecture, he had not demonstrated the materiality of the informant's testimony, nor had he shown "that disclosure of the informant's identity . . . would [have been] relevant or helpful to the

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1211. *Id.* at 1363.

1212. *Id.* at 1360. Section 7203 is not violated when failure to file an income tax return results from a good faith misunderstanding of the law. *United States v. Ross*, 626 F.2d 77, 80 n.1 (9th Cir. 1980); *United States v. Matosky*, 421 F.2d 410, 413 (7th Cir.), *cert. denied*, 398 U.S. 904 (1970).

1213. 353 U.S. 53 (1957).

1214. 633 F.2d at 1360.

1215. 353 U.S. at 60-61. In *Roviaro*, the defendant had been convicted in federal district court of knowingly possessing and transporting unlawfully imported heroin. The Court addressed the issue of whether the Government must disclose the identity of an undercover employee who had a material part in planning the commission of the crime and who was present at its occurrence. *Id.* at 55. The Court set forth a balancing test to determine the justifiability of such disclosure. The public interest in protecting its sources of information to preserve the flow of information must be weighed against the defendant's right to prepare his defense. Factors to be considered include the circumstances of each case, such as the crime charged, the possible defenses, the possible significance and materiality of the informer's testimony, and other relevant factors. *Id.* at 62. The Court stated, "[w]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of the accused, or is essential to a fair determination of a cause, the privilege must give way." *Id.* at 60-61.

1216. *Id.* See *supra* note 1215.

defense or essential to a fair determination of the case."<sup>1217</sup> Moreover, the Ninth Circuit ruled that such disclosure was not required merely because Buras' arrest resulted from an investigation undertaken pursuant to the informant's tip.<sup>1218</sup>

In *Briggs v. Raines*,<sup>1219</sup> the Ninth Circuit considered whether the district court had improperly dismissed a habeas corpus petition filed by the defendant which alleged a *Brady* violation based on the prosecution's refusal to disclose the victim's F.B.I. record.<sup>1220</sup> In reaching its decision, the *Briggs* court relied on Fifth Circuit authority wherein it was held that the prosecution's suppression of exculpatory evidence maintained by a related governmental agency violated due process.<sup>1221</sup> The court agreed with the State's contention that the record did not

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1217. 633 F.2d at 1360. The court noted that *Buras*, like *United States v. Kelly*, 449 F.2d 329 (9th Cir. 1971), was not a case where the informant was a witness to the crime. 633 F.2d at 1360. In *Kelly*, the defendant was found guilty of conspiring to import heroin and of knowingly concealing and facilitating the transportation and concealment of heroin. He appealed on the ground that the district court erred in not disclosing the identity of the informant. The *Kelly* court held that the defendant had failed to meet his burden of showing the need for disclosure. The court distinguished the case from *Roviaro* on the basis that the *Roviaro* informant directly participated in and witnessed the crime, whereas the *Kelly* informant neither dealt with the accused nor witnessed the crime. 449 F.2d at 330-31.

1218. 633 F.2d at 1360 (citing *Simpson v. Kreiger*, 565 F.2d 390, 391 (6th Cir. 1977), *cert. denied*, 435 U.S. 946 (1978)). The *Simpson* court interpreted *Roviaro* as not requiring the disclosure of the informant's identity when there is no indication that the informant participated in or witnessed the offense charged. 565 F.2d at 391-92 (citing *Phillips v. Cardwell*, 482 F.2d 1348, 1349 (6th Cir. 1973)).

1219. 652 F.2d 862 (9th Cir. 1981).

1220. *Id.* at 863-64. At trial, Briggs testified that the victim initiated a fight after Briggs resisted the victim's homosexual advances. The state trial court denied Briggs' request that the prosecution produce the victim's criminal record, including his FBI "rap sheet." *Id.* at 863.

The Arizona Supreme Court affirmed Briggs' conviction, holding that the prosecution's failure to produce the FBI "rap sheet" did not violate the *Brady* rule because the "rap sheet" was in the possession of the FBI, and not under the prosecution's control. The prosecution could therefore not have concealed this information. *State v. Briggs*, 112 Ariz. 379, 383, 542 P.2d 804, 808 (1975).

In his subsequent habeas corpus petition, Briggs argued that the prosecution failed to produce favorable evidence in violation of *Brady*. Briggs claimed that the FBI "rap sheet" would have bolstered his claim of self-defense, as it would have revealed a series of sexual assaults by the victim. The district court dismissed Briggs' petition without a hearing, finding merely that the *Brady* issue was considered and properly decided. 652 F.2d at 864. On appeal, the State conceded that a failure to obtain and disclose the FBI "rap sheet" of a homicide victim can constitute a *Brady* violation. *Id.* at 865; *see also supra* text accompanying note 1207. The prosecution further admitted that the FBI records were in its control at Briggs' trial. 652 F.2d at 865.

1221. 652 F.2d at 865 (citing *Martinez v. Wainwright*, 621 F.2d 184 (5th Cir. 1980)). The *Martinez* court found that although a medical examiner had possession of the "rap sheet," the prosecutor had access to it. *Id.* at 187. The court reasoned: "The rule of *Brady* would be thwarted if a prosecutor were free to ignore specific requests for material information ob-

adequately determine whether the victim's "rap sheet" was both material and favorable to Briggs. The court observed, however, that Briggs was never given an opportunity to demonstrate this fact.<sup>1222</sup> Thus, the *Briggs* court concluded that the habeas corpus petition was improperly dismissed, and remanded for an evidentiary hearing to determine whether the "rap sheet" would have produced material evidence favorable to Briggs' defense at trial.<sup>1223</sup>

In *United States v. Bissell*,<sup>1224</sup> the Ninth Circuit considered whether the district court acted within its discretion in refusing to allow either full disclosure of illegally obtained wiretap information or an adversary hearing to determine if the defendant was convicted without the use of illegally obtained evidence.<sup>1225</sup> Defendant Bissell had been a member of Students for a Democratic Society (SDS). Telephones in the SDS national headquarters had been monitored by use of an alleg-

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tainable by the prosecutor from a related governmental entity, though unobtainable by the defense." *Id.*

The *Briggs* court also cited 28 U.S.C. § 534(a) (1976), which states that "[t]he Attorney General shall:

(1) acquire, collect, classify and preserve identification, criminal identification, crime and other records; and

(2) exchange these records with, and for the official use of, authorized officials of the Federal Government, the States, cities and penal and other institutions."

Finally, the *Briggs* court recognized an Oregon appellate court decision, holding that in almost every case, FBI "rap sheets" are in the constructive possession of the State. 652 F.2d at 865 (citing *State v. Ireland*, 11 Or. App. 264, 268, 500 P.2d 1231, 1233 (Or. Ct. App. 1972)).

1222. 652 F.2d at 865-66. Neither the record nor the Arizona Supreme Court opinion referred to the contents of the "rap sheet." The Arizona Supreme Court did not address the materiality issue because it held that the FBI records, if any, were not in the prosecution's control. The district court was asked to evaluate Briggs' assertions that the victim had a record of sexual assaults and to decide whether this information would have been both favorable and material to Briggs' defense; instead, it summarily dismissed Briggs' petition without holding an evidentiary hearing. *Id.*

1223. *Id.* at 866. In *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court stated that "[a] fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." *Id.* at 104.

In the instant case, Briggs made a specific request for information, namely the contents of the FBI "rap sheet." The *Agurs* Court stated that if defense counsel requests specific evidence, the standard of materiality is whether the evidence "might have affected the outcome of the trial." *Id.* at 104. If the defense makes a general request for "all *Brady* material" or "anything exculpatory," the standard of materiality is higher. *Id.* at 106-07. *See, e.g., United States v. Ramirez*, 608 F.2d 1261, 1265 (9th Cir. 1979) (where no specific defense request for evidence made, prosecution's failure to disclose violates due process only "if the omitted evidence creates a reasonable doubt [about the defendant's guilt] that did not otherwise exist." (quoting *United States v. Agurs*, 427 U.S. at 112)).

1224. 634 F.2d 1228 (9th Cir. 1980).

1225. *Id.* at 1234.

edly illegal national security wiretap. Bissell was later observed and apprehended by a university guard while attempting to place a bomb under the steps of an Air Force ROTC building.<sup>1226</sup>

Bissell was convicted of conspiring willfully and unlawfully to injure the property of the United States and of willfully and knowingly possessing an unregistered destructive device.<sup>1227</sup> After her conviction, Bissell moved for an order to compel Government disclosure and for discovery regarding the Government's alleged use of evidence obtained from illegal electronic surveillance in violation of her fourth amendment rights.<sup>1228</sup> The district court denied the motion, holding that none of the evidence introduced at trial was obtained through electronic surveillance.<sup>1229</sup>

The Ninth Circuit initially stated that a discussion of *Alderman v. United States*<sup>1230</sup> was essential to resolve the issue presented.<sup>1231</sup> In *Alderman*, the Supreme Court considered the procedures to be followed by the district court in resolving whether evidence against the defendant-petitioner grew out of his illegally overheard conversations or conversations occurring on the premises.<sup>1232</sup> The Court held that (1) the illegally obtained "surveillance records . . . should be turned over to [defendant-petitioner] without being screened *in camera* by the trial judge,"<sup>1233</sup> and (2) a meaningful adversary hearing should then be held

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1226. *Id.* at 1229-30.

1227. *Id.* at 1229.

1228. *Id.* at 1230. Bissell filed a pretrial motion for discovery, disclosure and inspection, and specific hearing procedures on the electronic surveillance matters to determine the legality of the wiretap, her standing, and the admissibility of evidence obtained by the wiretap. In response to this motion, the Government ordered investigations of a number of federal law enforcement agencies which revealed transcripts of three telephone conversations which were made available to her. *Id.* Bissell claimed that the meager amount of evidence uncovered indicated that the investigation and disclosure process was inadequate. Nevertheless, the district court postponed any hearing on electronic surveillance matters until after trial. *Id.*

1229. *Id.* The trial court found that because of numerous demonstrations and previous damage to ROTC facilities, the university had taken precautions against further damage by stationing guards nightly in all campus ROTC buildings. According to the court, these guards thus observed and apprehended the defendant independently of any illegally intercepted conversations. *Id.* at 1231.

1230. 394 U.S. 165 (1969).

1231. 634 F.2d at 1231.

1232. 394 U.S. at 180.

1233. *Id.* at 182. The Court explained that the task of identifying the records which may have contributed to the Government's case was too complex to permit reliance on the *in camera* judgment of the trial court. The Court noted that certain information contained in the surveillance records which might be meaningless to the trial judge may have had special significance to someone well acquainted with the defendant. *Id.* The Court continued:

on the issue of tainted evidence.<sup>1234</sup>

The *Bissell* court noted that in *Taglianetti v. United States*<sup>1235</sup> the Supreme Court held that "[n]othing in *Alderman* . . . requires an adversary proceeding and full disclosure for resolution of every issue raised by an electronic surveillance."<sup>1236</sup> The *Taglianetti* Court distinguished *Alderman* because the *in camera* procedures there would have been inadequate to preserve the defendant's fourth amendment rights; in contrast, the trial court in *Taglianetti* was asked to insure the accuracy of the Government's voice identifications.<sup>1237</sup> This task was held to be less complex than that faced by the trial court in *Alderman*, and thus the *Taglianetti* Court upheld the trial court's reliance upon the *in camera* examination.<sup>1238</sup>

The *Bissell* court also noted that case law indicates that the district court has some discretion when faced with requests for the disclosure of illegally obtained wiretap information and adversary hearings.<sup>1239</sup> Such discretion is especially warranted when it is clear that the evidence introduced at trial was obtained without the use of an illegal wiretap.<sup>1240</sup>

The Ninth Circuit ultimately determined that "the allegedly illegal electronic surveillance was entirely unrelated to the stationing of the single campus security guard instrumental in the apprehension of the appellant, . . . [and, therefore,] the government's case was entirely in-

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"[W]e think this resolution will avoid an exorbitant expenditure of judicial time and energy and will not unduly prejudice others or the public interest." *Id.* at 184.

1234. *Id.* at 183-84. The Court noted that at such a hearing the defendant has the burden of producing specific evidence demonstrating a taint; the Government must then purge the taint by proving that its evidence was acquired from an independent source. *Id.* at 183.

1235. 394 U.S. 316 (1969) (per curiam). In *Taglianetti*, the First Circuit affirmed defendant's conviction on three counts of willfully attempting to evade payment of income tax. *Id.* at 316. On remand, the district court examined *in camera* surveillance records obtained by the Government to determine whether the Government had correctly identified defendant's voice and had turned over to him each conversation. The defendant argued that he was entitled to examine the records because neither the Government nor the district court had definitively determined which of the conversations he had actually participated in. *Id.* at 317.

1236. 634 F.2d at 1232 (quoting *Taglianetti v. United States*, 394 U.S. at 317).

1237. 394 U.S. at 317.

1238. *Id.* at 317-18.

1239. 634 F.2d at 1233.

1240. *Id.* (citing *United States v. Buck*, 548 F.2d 871, 874 (9th Cir.) (post-trial hearing proper where no discernable nexus between surveillance and matters to be proved at trial), *cert. denied*, 434 U.S. 840 (1977); *United States v. Villano*, 529 F.2d 1046, 1059 (10th Cir.) (no abuse of discretion to refuse disclosure or adversary hearing where taint dissipated), *cert. denied*, 426 U.S. 953 (1976); *United States v. Sellers*, 315 F. Supp. 1022, 1023 (N.D. Ga. 1970) (*Alderman* implicitly requires that admission of tainted evidence could have resulted in conviction)).



dependent of any possible exploitation of any illegality."<sup>1241</sup> Based on this determination, the court held that the Government's disclosure was adequate to safeguard Bissell's rights<sup>1242</sup> and that the district court acted within its discretion "in refusing to order additional disclosure and adversary hearings pursuant to appellant's overbroad motion."<sup>1243</sup>

In *Furlow v. United States*,<sup>1244</sup> the Ninth Circuit considered whether it was an abuse of discretion for the district court to permit the deposition of a key witness and the introduction at trial of testimony so obtained where the witness was ill and his testimony was taken to preserve it for trial.<sup>1245</sup> Defendant Furlow was convicted on two counts of possessing and uttering a United States treasury check with intent to defraud.<sup>1246</sup> He claimed that the district court erred in permitting a deposition of the payee of the check, Wilfred Peatross, to be taken and used pursuant to Federal Rule of Criminal Procedure 15(a).<sup>1247</sup> The court found Furlow's claim without merit.<sup>1248</sup> It noted that the district court has discretion to grant<sup>1249</sup> or deny<sup>1250</sup> a motion to depose a proposed witness in a criminal trial, and held that under the circumstances the district court did not abuse its discretion in applying Rule 15.<sup>1251</sup>

The *Furlow* court also dismissed the defendant's claim that the dis-

1241. 634 F.2d at 1233-34.

1242. *Id.* The Ninth Circuit explained:

The fact that one of the transcripts refers to an undisclosed conversation and that the appellant claimed she made at least twenty-five telephone calls to the SDS National Headquarters does not mean that any additional search is required. These contentions do not rise above a mere suspicion that there might be somewhere in the government's files a recording of appellant's voice which might in some manner have tainted the evidence introduced at trial. Certainly they do not warrant remand on the facts of this case.

*Id.*

1243. *Id.* at 1234. The *Bissell* court noted that, unlike *Alderman*, further inquiries into wiretap matters would have served no purpose since the Government disclosed all of the tapes its search had uncovered. 634 F.2d at 1234.

1244. 644 F.2d 764 (9th Cir.), *cert. denied*, 454 U.S. 871 (1981).

1245. *Id.* at 766-67.

1246. *Id.* at 765-66.

1247. *Id.* at 766. FED. R. CRIM. P. 15(a) provides in pertinent part:

Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice to the parties order that testimony of such witnesses be taken by deposition . . . .

1248. 644 F.2d at 767.

1249. *See, e.g.*, *United States v. Richardson*, 588 F.2d 1235, 1241 (9th Cir. 1978) (Rule 15(a) authorizes trial court to permit depositions when interests of justice served), *cert. denied*, 440 U.S. 947 (1979).

1250. *See, e.g.*, *United States v. Rich*, 580 F.2d 929, 933-34 (9th Cir.) (depositions in criminal cases not permitted for the purpose of discovery alone), *cert. denied*, 439 U.S. 935 (1978).

1251. 644 F.2d at 767.

trict court made a series of technical errors regarding the taking of the deposition,<sup>1252</sup> holding that he was not deprived of the safeguards of the criminal rules.<sup>1253</sup> The court emphasized that a series of precautions were taken to afford the defendant due process: he was provided a right to confrontation, effective representation, sufficient notice, and the opportunity to test Peatross' credibility.<sup>1254</sup>

Furlow also contended that the introduction at trial of a police report prejudiced his case.<sup>1255</sup> The circuit court initially found that because the report was not part of the prosecutor's file, its disclosure was not required by Federal Rule of Criminal Procedure 16<sup>1256</sup> nor by *Brady v. Maryland*.<sup>1257</sup> When the police report was discovered, the prosecution made it available to Furlow's counsel for overnight study and for use on cross-examination.<sup>1258</sup> The court concluded that, under these circumstances, Furlow was not prejudiced by its use.<sup>1259</sup>

In *United States v. Mills*,<sup>1260</sup> the Government appealed an order requiring production of statements made by inmates whom the Government had interviewed but did not intend to call as witnesses. The Ninth Circuit granted the Government's petition for a writ of mandamus.<sup>1261</sup>

The Jencks Act,<sup>1262</sup> which governs the production of witness statements,<sup>1263</sup> provides that no statement of a Government witness is discoverable until the witness has testified on direct examination.<sup>1264</sup> In

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1252. *Id.*

1253. *Id.* The *Furlow* court found no abuse of discretion in the district court's application of FED. R. CRIM. P. 15(b) which provides:

A defendant not in custody shall have the right to be present at the examination upon request subject to such terms as may be fixed by the court, but his failure, absent good cause shown, to appear after notice and tender of expenses in accordance with subdivision (c) of this rule shall constitute a waiver of that right and of any objection to the taking and use of the deposition based upon that right.

1254. 644 F.2d at 767. The district court issued a writ of habeas corpus, releasing defendant from state custody, to permit his presence during the deposition. Because his appointed counsel was on active military duty, the district court appointed substitute counsel to represent him at that proceeding. This attorney and a United States Marshal met with defendant, and he was tendered expenses to attend the deposition, but chose not to do so. *Id.* at 766.

1255. *Id.* at 767.

1256. *Id.* FED. R. CRIM. P. 16(a) provides for the disclosure of evidence by the Government.

1257. *Id.* See *supra* text accompanying notes 1206-07.

1258. 644 F.2d at 767.

1259. *Id.*

1260. 641 F.2d 785 (9th Cir.), *cert. denied*, 454 U.S. 871 (1981).

1261. *Id.* at 789-90.

1262. 18 U.S.C. § 3500 (1976).

1263. *Palermo v. United States*, 360 U.S. 343, 351 (1959).

1264. 18 U.S.C. § 3500(a) (1976) provides:

*Mills*, the Ninth Circuit stated that "Federal Rule of Criminal Procedure 16(a)(2) excludes . . . 'statements made by government witnesses or prospective government witnesses'" from the category of evidence the defense is entitled to discover before trial, except as provided in the Jencks Act.<sup>1265</sup> The court observed that "[f]or the purposes of Rule 16, statements made by persons who were prospective witnesses when interviewed do not lose that character by a subsequent decision not to call them at trial."<sup>1266</sup>

The *Mills* court rejected the defendants' argument that the statements were documents discoverable under Federal Rule of Criminal Procedure 16(a)(1)(C)<sup>1267</sup> and held that the trial court exceeded its authority in ordering the production of these statements over the Government's objection.<sup>1268</sup> The court stated that protection of statements made by prospective witnesses is necessary to protect the witnesses from threats, bribery, or perjury.<sup>1269</sup> The *Mills* court noted that in the instant case the need to protect the Government witnesses was especially great, as they were prison inmates and lived in constant fear of retaliation for providing evidence against fellow inmates.<sup>1270</sup> The court also noted that cooperation by prison inmates would be extremely unlikely if they were not protected in their capacity as Government witnesses.<sup>1271</sup>

In *United States v. Valencia*,<sup>1272</sup> the Ninth Circuit considered whether the defendant was prejudiced by a procedural irregularity regarding the admission into evidence of a cocaine bindle, seized during

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In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of a subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

*Accord* *United States v. Jones*, 612 F.2d 453, 454-55 (9th Cir. 1979), *cert. denied*, 445 U.S. 966 (1980).

1265. 641 F.2d at 790 (quoting FED. R. CRIM. P. 16(a)(2)).

1266. 641 F.2d at 790.

1267. *Id.* FED. R. CRIM. P. 16(a)(1)(C) provides in pertinent part:

Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph . . . documents . . . which are within the possession, custody or control of the government, and which are material to the preparation of his defense, or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the government.

1268. 641 F.2d at 790.

1269. *Id.* (citing *United States v. Walk*, 533 F.2d 417, 419 (9th Cir. 1975)). *Accord* *United States v. Percevault*, 490 F.2d 126, 129 (2d Cir. 1974).

1270. 641 F.2d at 790.

1271. *Id.*

1272. 656 F.2d 412 (9th Cir.), *cert. denied*, 454 U.S. 877 (1981).

his lawful arrest.<sup>1273</sup>

Defendants Valencia and Duarte were convicted of conspiring to distribute heroin and cocaine.<sup>1274</sup> Valencia was also convicted of unlawfully carrying a firearm in the commission of a felony.<sup>1275</sup> They were arrested after conducting a narcotics transaction with a paid Government informant and a special agent of the Drug Enforcement Administration (DEA). After placing them under arrest, the DEA agent seized a bag containing approximately fifteen ounces of heroin from the floor of Valencia's automobile. A search incident to Valencia's arrest revealed a loaded and cocked .45 caliber pistol concealed in the back of his pants and a small bundle of cocaine in a jacket pocket.<sup>1276</sup>

As a prerequisite to suppression of the evidence under Federal Rule of Criminal Procedure 12(b)(3),<sup>1277</sup> Valencia moved under Rule 12(d)<sup>1278</sup> to request notice of the Government's intention to use any evidence which he may have been entitled to discover under Rule 16.<sup>1279</sup> The Government provided Valencia with a list of certain evidence to be introduced at trial, and during trial, the Government stipulated that it had made "an intentional, deliberate and conscious decision" not to include the bundle of cocaine in its list of evidence.<sup>1280</sup>

The Government, however, did offer the cocaine into evidence, and the court admitted it over Valencia's objection.<sup>1281</sup> The court also

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1273. *Id.* at 416.

1274. *Id.* at 413-14.

1275. *Id.*

1276. *Id.* at 414.

1277. FED. R. CRIM. P. 12(b)(3) provides: "Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial: . . . (3) Motions to suppress evidence . . ."

1278. FED. R. CRIM. P. 12(d) provides:

At the arraignment or as soon thereafter as is practicable, the government may give notice to the defendant of its intention to use specified evidence at trial in order to afford the defendant an opportunity to raise objections to such evidence prior to trial under subdivision (b)(3) of this rule.

At the arraignment or as soon thereafter as is practicable the defendant may, in order to afford an opportunity to move to suppress evidence under subdivision (b)(3) of this rule, request notice of the government's intention to use (in its evidence in chief at trial) any evidence which the defendant may be entitled to discover under Rule 16 subject to any relevant limitations prescribed in Rule 16.

1279. FED. R. CRIM. P. 16(a)(1)(C) provides in pertinent part:

Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph . . . tangible objects . . . which are within the possession, custody or control of the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at trial, or were obtained from or belong to the defendant.

1280. 656 F.2d at 415.

1281. *Id.*

allowed a supplemental motion to suppress the evidence.<sup>1282</sup> On appeal, Valencia claimed that the district court should not have allowed the Government to introduce the cocaine into evidence because such admission violated the spirit and letter of Federal Rule of Criminal Procedure 12(d), as well as his right to a fair trial and due process of law.<sup>1283</sup>

The Ninth Circuit relied on *United States v. Baxter*<sup>1284</sup> for the proposition that the district court has discretion to determine the appropriate sanction for a failure to comply with a discovery rule.<sup>1285</sup> The court then addressed the question of whether the district court abused this discretion<sup>1286</sup> and analogized the case at bar to *United States v. Pheaster*.<sup>1287</sup> The *Valencia* court observed that, as in *Pheaster*,

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1282. *Id.*

1283. *Id.* The Ninth Circuit considered the purpose of Rule 12(d) as stated in the Notes of the Advisory Committee on Rules: "to avoid the necessity of moving to suppress evidence which the government does not intend to use." *Id.* (quoting Rule 12, Notes of Advisory Committee on Rules). According to the Advisory Committee, the rule did not provide for sanctions because the Committee believed that attorneys for the Government would comply and that judges have at their disposal the means to insure compliance. The automatic exclusion of evidence, the committee stated, would create too heavy a burden on the exclusionary rule, especially when the defendant has the opportunity for broad discovery under Rule 16. The Advisory Committee noted that the suppression of evidence *could* result from a failure to comply with the duty of giving notice but because the ABA Project on Standards for Criminal Justice makes it clear that the rule is intended as a matter of procedure, otherwise admissible evidence need not be suppressed. 656 F.2d at 415 (citing PROJECT ON STANDARDS FOR CRIMINAL JUSTICE STANDARDS RELATING TO ELECTRONIC SURVEILLANCE 116 (Approved Draft 1971)).

1284. 492 F.2d 150 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974).

1285. 656 F.2d at 415 (citing *United States v. Baxter*, 492 F.2d at 174). In *Baxter*, the Ninth Circuit affirmed defendants' drug convictions, although the Government failed to comply with a pretrial order to provide them with a transcript of the grand jury testimony of a Government witness at least 24 hours prior to trial. Following *Hansen v. United States*, 393 F.2d 763 (8th Cir. 1968), the Ninth Circuit stated that "the sanctions to be imposed, if any, because of a failure to comply with a pretrial discovery order rest with the sound discretion of the trial court." 492 F.2d at 174 (citing *Hansen*, 393 F.2d at 769-70). The *Baxter* Court found no abuse of discretion in permitting the Government witness to testify because the defendant was not prejudiced by the Government's delay. 492 F.2d at 174.

1286. 656 F.2d at 415.

1287. 544 F.2d 353 (9th Cir. 1976), *cert. denied*, 429 U.S. 1099 (1977). In *Pheaster*, the defendant challenged the district court's refusal to suppress certain evidence found during a search of his residence on the ground that it was originally contemplated that nothing seized from the residence would be introduced at trial. *Id.* at 382. In the exercise of its discretion, the district court had allowed the evidence to be introduced, subject to any motions to suppress by the defendant Inciso. After Inciso filed suppression motions, the district court conducted a hearing and determined that the evidence was admissible. The Government later attempted to introduce additional evidence seized during the search, and the court also admitted this evidence over Inciso's objections. *Id.* at 382. The *Pheaster* court held that even though this procedure was not ideal,

[I]t was, for the most part, dictated by the Government's vacillation concerning the

the defendant was given sufficient opportunity to present his objections to the district court.<sup>1288</sup> He was not, therefore, prejudiced by the procedural irregularity, and lack of such prejudice prevented a finding that the district court had abused its discretion in admitting the cocaine bundle.<sup>1289</sup>

### *E. Government's Civil Discovery of Grand Jury Materials*

In *In re Grand Jury Investigation No. 78-184*,<sup>1290</sup> the Ninth Circuit held that Government attorneys do not have an absolute right to disclosure of grand jury materials for use in civil proceedings. Instead, such disclosure is to be obtained through a court order.<sup>1291</sup> Central to the court's determination was its interpretation of Federal Rule of Criminal Procedure 6(e) governing the secrecy of grand jury proceedings. Rule 6(e)(3)(A)(i) and (ii) permits disclosure of grand jury materials to:

(i) an attorney for the government for use in the performance of such attorney's duty; and (ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.<sup>1292</sup>

In *In re Grand Jury Investigation*, the Government moved for disclosure of grand jury materials used in a prior criminal prosecution for use in a possible civil suit against the same defendants. The district court ruled that under Rule 6(e)(3)(A)(i) the Civil Division of the De-

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evidence that it would present. The district court exercised its discretion to allow the evidence to be introduced. In doing so, it gave Inciso sufficient opportunity to present his objections and to preserve his position on appeal.

*Id.*

1288. 656 F.2d at 416. The court noted that Valencia had been afforded two suppression hearings, each involving evidence seized during the search: the pistol and the cocaine bundle. The court further observed that Valencia also was permitted pretrial discovery of the laboratory analysis of the cocaine bundle. *Id.*

1289. *Id.*

1290. 642 F.2d 1184 (9th Cir. 1981).

1291. *Id.* at 1190.

1292. FED. R. CRIM. P. 6(e)(3)(A)(i), (ii). Rule 6(e)(3)(C)(i) and (ii) further provides:

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made —

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

FED. R. CRIM. P. 6(e)(3)(C)(i), (ii).

partment of Justice was entitled to the materials as a matter of right.<sup>1293</sup> The defendants appealed, asserting that the pertinent provision applied only to disclosure in aid of criminal, rather than civil law enforcement.<sup>1294</sup>

The court's construction of Rule 6(e) derived from legislative history which the court examined in light of "the traditional and fundamental policy of grand jury secrecy."<sup>1295</sup> The court compared the broad investigatory powers of the grand jury in criminal matters to the discovery limitations imposed on civil litigants and concluded that "[t]o grant the government an *absolute right* of access to grand jury materials for civil use might irresistibly encourage use of the grand jury as a tool of civil discovery."<sup>1296</sup> Furthermore, the court held that judicial review of such abuse would be crippled by allowing civil attorneys to have access to grand jury materials as a matter of right.<sup>1297</sup> These considerations, in conjunction with the court's determination that the Rule 6(e) "exception . . . was motivated primarily . . . by the grand jury's need for legal and technical assistance,"<sup>1298</sup> led the court to hold that "Congress intended a court order under [Rule 6(e)(3)(C)] to be the avenue to access to grand jury materials by the government for civil use."<sup>1299</sup>

The court remanded with instructions to determine the propriety of a court order mandating disclosure to the Civil Division of the Department of Justice. To assist the district court in its determination, the court of appeals set forth a balancing test whereby "the district court must examine each distinguishable type of protected material and de-

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1293. 642 F.2d at 1186-87.

1294. *Id.* at 1189. The Ninth Circuit first rejected the Government's argument that the appeal was moot because disclosure to civil attorneys and their assistants had already been made. "Each day this order remains effective the veil of secrecy is lifted higher by disclosure to additional personnel and by the continued access of those to whom the materials have already been disclosed." *Id.* at 1187-88.

1295. *Id.* at 1190. The policies underlying grand jury secrecy were enunciated by the Supreme Court in *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958) (quoting *United States v. Rose*, 215 F.2d 617, 628-29 (3d Cir. 1954)):

(1) [t]o prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect [the] innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

1296. 642 F.2d at 1190 (emphasis in original).

1297. *Id.*

1298. *Id.*

1299. *Id.*

termine for each whether the need for disclosure outweighs the traditional and fundamental presumption of secrecy."<sup>1300</sup> By requiring a court order to disclose grand jury materials to government civil attorneys, the Ninth Circuit established a more stringent procedure than other circuits which have considered the issue.<sup>1301</sup>

#### *F. Defendant's Presence at Pretrial Conference*

Federal Rule of Criminal Procedure 43(a) requires that a defendant be present "at the arraignment, at the time of plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule."<sup>1302</sup> Rule 43(c)(3) provides, however, that a defendant's presence is not required "[a]t a conference or argument upon a question of law."<sup>1303</sup>

The Ninth Circuit recently interpreted Rule 43 in *United States v. Veatch*.<sup>1304</sup> Veatch was not present in chambers during a pretrial conference concerning several matters, including his request for an evidentiary hearing to determine his competency to stand trial, a motion regarding his insanity defense, and his motion for continuance.<sup>1305</sup> Veatch claimed that he was denied access to the pretrial conference despite his request to be present. No record of such a request was found.<sup>1306</sup>

The court held that, regardless of whether Veatch had requested permission to attend the conference, his absence did not violate his due process rights.<sup>1307</sup> The court relied on *Snyder v. Massachusetts*<sup>1308</sup> and

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1300. *Id.* at 1192.

1301. The Fifth Circuit has held, for example, that:

Rule 6(e), as amended in 1977, permits the disclosure of grand jury materials without a court order only when made to attorneys for the government in performance of their duties or government personnel deemed necessary to assist an attorney for the government in the performance of his duties to enforce federal criminal law. This disclosure limitation, restricting use to criminal law enforcement, does not apply to government attorneys.

In re Grand Jury, 583 F.2d 128, 130 (5th Cir. 1978) (per curiam) (emphasis added in last sentence).

1302. FED. R. CRIM. P. 43(a). Rule 43(b)(1) & (2) further provide that a defendant shall be considered to have waived his right to be present if he voluntarily absents himself during trial or if he is ejected from the courtroom for disruptive conduct after being warned by the court of such possibility. FED. R. CRIM. P. 43(b)(1), (2).

1303. FED. R. CRIM. P. 43(c)(3).

1304. 647 F.2d 995 (9th Cir. 1981).

1305. *Id.* at 1003.

1306. *Id.*

1307. *Id.*

1308. 291 U.S. 97 (1934). The *Snyder* Court held that although the defendant was not



*Faretta v. California*,<sup>1309</sup> as well as Federal Rule of Criminal Procedure 43(c)(3), in reaching its conclusion. According to the court, "Veatch's presence would have contributed nothing substantial to his opportunity to defend since the matters discussed predominantly involved questions of law."<sup>1310</sup>

I. ARREST, SEARCH, AND SEIZURE

- A. *Betty J. Levine*
- B. *Betty J. Levine*
- C. *Leslie A. Conrad*
- D.
  - 1. *Betty J. Levine*
  - 2. *Leslie A. Conrad*
  - 3. *James M. Patronite, Jr.*
- E. *Betty J. Levine*
- F. *Betty J. Levine*
- G. *Betty J. Levine*

II. PROCEDURAL RIGHTS OF THE ACCUSED

- A. *Susan M. Gill*
- B. *Kipp Ian Lyons*
- C. *Katherine A. Lind*
- D. *Nancy E. Raney*
- E. *Kipp Ian Lyons*

III. PRETRIAL PROCEEDINGS

- A.
  - 1. *Janice M. Lipeles*
  - 2. *Janice M. Lipeles*
  - 3. *Janice M. Lipeles*
  - 4. *Janice M. Lipeles*
  - 5. *Janice M. Lipeles*
  - 6. *Nancy E. Raney*

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present when the jury viewed the scene of the crime, his due process rights were not violated; the defendant's presence is required only when it "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Id.* at 105-06.

1309. 422 U.S. 806 (1975). The *Faretta* Court noted that defendant's presence is constitutionally required only at "stages of the trial where his absence might frustrate the fairness of the proceedings." *Id.* at 819 n.15 (citing *Snyder v. Massachusetts*, 291 U.S. 97 (1934)).

1310. 647 F.2d at 1004. The court emphasized that because the defendant "was completely and effectively represented by counsel at the conference," his absence did not detrimentally affect the fairness of his trial. *Id.*

7. *Nancy E. Raney*
8. *Marc J. Graboff*
- B. *Janice M. Lipeles*
- C. *Susan M. Gill*
- D. *Nancy E. Raney*
- E. *Susan M. Gill*
- F. *Susan M. Gill*

